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# The Constitutional Right to (Keep Your) Same-Sex Marriage

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# THE CONSTITUTIONAL RIGHT TO (KEEP YOUR) SAME-SEX MARRIAGE

Steve Sanders\*

*Same-sex marriage is now legal in six states, and tens of thousands of same-sex couples have already gotten married. Yet the vast majority of other states have adopted statutes or constitutional amendments banning same-sex marriage. These mini-defense of marriage acts not only forbid the creation of same-sex marriages; they also purport to void or deny recognition to the perfectly valid same-sex marriages of couples who migrate from states where such marriages are legal. These nonrecognition laws effectively transform the marital parties into legal strangers, causing significant harms: property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil.*

*In this Article, I argue that an individual who marries in her state of domicile and then migrates to a mini-defense of marriage act state has a significant liberty interest under the Fourteenth Amendment's Due Process Clause in the ongoing existence of her marriage. This liberty interest creates a right of marriage recognition that prevents another state from effectively divorcing her against her will by operation of law. The right of marriage recognition is conceptually and doctrinally distinguishable from the constitutional "right to marry." It is a neutral principle grounded in core Due Process Clause values: protection of reasonable expectations and of marital and family privacy, respect for established legal and social practices, and rejection of the idea that a state can sever a legal family relationship merely by operation of law. A mini-defense of marriage act state will, of course, have interests to be considered in refusing to recognize certain marriages. But under the intermediate form of scrutiny that is appropriate in these circumstances, those interests do not rise to a sufficiently important level to justify the nullification of migratory same-sex marriages.*

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## INTRODUCTION

Imagine that Helen and Jenny reside and marry in Iowa. Iowa is among the six states, plus the District of Columbia, where same-sex marriage is now legal.<sup>1</sup> Now consider that more than 130,000 same-sex couples in the

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1. The states are Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont. *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex->

United States report being married,<sup>2</sup> and that between 2 and 3 percent of Americans move to a different state each year<sup>3</sup>—meaning we could expect that at least 2,600 married same-sex couples may do so. And so imagine that Helen and Jenny pull up stakes and move to Indiana. Perhaps Helen’s employer transfers her to Indianapolis or Jenny’s elderly mom in Fort Wayne needs her closer by.

Helen and Jenny now have a problem. Indiana law purports to declare their marriage “void” because it involves two members of the same sex.<sup>4</sup> Indiana is among forty-one states that have adopted statutes or constitutional amendments banning same-sex marriage (typically called mini-defense of marriage acts, or “mini-DOMAs”).<sup>5</sup> The vast majority of mini-DOMAs not only forbid the *creation* of same-sex marriages but their statutory or constitutional language would also void or deny recognition to the perfectly valid same-sex marriages of couples who migrate from states where such marriages are legal.<sup>6</sup> Even if they do not purport to actually void a marriage, these nonrecognition laws transform same-sex marital parties into complete legal strangers, with none of the customary rights or incidents of marriage, so long as they continue to live in the mini-DOMA state. For practical purposes, the parties have been divorced against their will by operation of law.

We live in a highly mobile country, and so we can assume that many married same-sex couples have already changed states, or will do so, for jobs, education, family, and personal reasons. The question of “what happens to

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marriage-overview.aspx (last updated Feb. 13, 2012) [hereinafter NAT’L CONF. OF STATE LEGISLATURES]. As this Article was going to press, legislation had been approved in Maryland and the State of Washington to allow same-sex marriages, but the laws had not yet taken effect and opponents were preparing to attempt to repeal the laws by ballot initiative. David Crary, *Bruising Gay-Marriage Showdowns Likely in 5 States*, ASSOCIATED PRESS, Mar. 8, 2012, available at 2012 WLNR 5114280.

2. *Census Bureau Releases Estimates of Same-Sex Married Couples*, U.S. CENSUS 2010 (Sept. 27, 2011), <http://2010.census.gov/news/releases/operations/cb11-cn181.html>.

3. See Haya El Nasser & Paul Overberg, *Millions More Americans Move to New States*, USA TODAY, Nov. 30, 2007, [http://www.usatoday.com/news/nation/2007-11-29-Mobility\\_N.htm](http://www.usatoday.com/news/nation/2007-11-29-Mobility_N.htm) (citing U.S. census data from 2003, 2005, and 2006).

4. IND. CODE ANN. § 31-11-1-1 (West 2008) (declaring same-sex marriages “void . . . even if the marriage is lawful in the place where it is solemnized”).

5. See NAT’L CONF. OF STATE LEGISLATURES, *supra* note 1 (listing, in a table, the states that either define marriage by statute as between a man and a woman or have passed a DOMA constitutional amendment). The states that neither license nor prohibit same-sex marriage are New Jersey, New Mexico, and Rhode Island. *Id.*

6. For example, Arkansas law provides that “[a]ll marriages contracted outside this state that would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts in this state,” but that “[t]his section shall not apply to a marriage between persons of the same sex.” ARK. CODE ANN. § 9-11-107(a)–(b) (2009). Missouri law states flatly that “[a]ny purported marriage not between a man and a woman is invalid,” and that “[a] marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.” MO. ANN. STAT. § 451.022(2), (4) (West 2003). And Ohio’s mini-DOMA provides, “Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.” OHIO REV. CODE ANN. § 3101.01(C)(2) (West 2008).

people in legally recognized same-sex relationships when they cross state lines” has received “far too little attention in the debates about gay rights.”<sup>7</sup> Nonrecognition laws are already disrupting lives, and it is reasonable to expect that they will become an increasingly serious issue in gay rights litigation, politics, and even the national employment marketplace.<sup>8</sup> (For example, major corporations are increasingly adopting gay-friendly policies,<sup>9</sup> but a married gay or lesbian worker might well balk at accepting a transfer to a state that purports to nullify her marriage.)<sup>10</sup>

Most legal scholars who think about this question would say that Helen and Jenny have a conflict of laws problem: they are collateral damage in a scheme of family law localism that says every state gets to control the definition of marriage within its borders. I maintain, by contrast, that couples like Helen and Jenny actually have a *constitutional* problem, one that requires a constitutional solution. And to be clear, the problem is not about their “right to marry”—after all, they already *are* married. Rather, the problem is about their right to *remain* married.

In this Article, I argue that an individual who legally marries in her state of domicile,<sup>11</sup> and then migrates to another state that becomes her new domicile, has a significant liberty interest under the Fourteenth Amendment’s Due Process Clause in the ongoing existence of her marriage. This liberty interest creates a right of marriage recognition that prevents a mini-DOMA state from effectively divorcing her by operation of law. This right of marriage recognition is conceptually and doctrinally distinguishable from the constitutional “right to marry.”<sup>12</sup> It is a neutral principle, grounded in core Due Process Clause values: protection of reasonable expectations and of marital and family privacy, respect for established legal and social practices, and rejection of the idea that a state can sever a legal family relationship or alter a legal status merely by operation of law.<sup>13</sup> Of course, this is not to deny that a mini-DOMA jurisdiction will believe that it possesses state inter-

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7. Andrew Koppelman, *The Limits of Strategic Litigation*, 17 LAW & SEXUALITY 1, 2 (2008).

8. The mainstream media have begun to notice the problem. See, e.g., John Schwartz, *When Same-Sex Marriages End*, N.Y. TIMES, July 2, 2011, available at <http://www.nytimes.com/2011/07/03/sunday-review/03divorce.html>.

9. See *Corporate Equality Index 2012*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/corporate-equality-index-2011> (last visited Feb. 12, 2012).

10. As one way of facilitating mobility and freedom of choice for married couples, Adam Candeub and Mae Kuykendall have suggested that states should no longer require the parties’ physical presence in the state before they will authorize a marriage, thereby “mak[ing] their marriage formation laws accessible to those beyond their physical boundaries.” Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 741 (2011).

11. “Domicile” is effectively the legal “headquarters” of a person’s life, used for determining which state’s laws apply to her activities. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 249 (4th ed. 2004).

12. See *infra* Section III.A.

13. See *infra* Section IV.B.

interests that justify refusing to recognize certain marriages.<sup>14</sup> But under the intermediate form of scrutiny, which I argue is appropriate,<sup>15</sup> those interests are not sufficiently important to justify nullification of a migratory same-sex marriage.

Law favors stability in legal relationships, vindication of justified expectations, and preventing casual evasion of legal duties and responsibilities. For these reasons, every state adheres to a general rule that a marriage that was valid under the law of the place where it was celebrated should be recognized everywhere.<sup>16</sup> Current nonrecognition laws—most of them enacted in the last fifteen years as part of the political backlash against same-sex marriage—are a stark and arguably unprecedented departure from this rule. As a result, migratory same-sex couples face the prospect of wrenching disruption in their lives, loss of parental and property rights, and an array of other problems and indignities, large and small, that a rational legal regime should not tolerate. Justice O'Connor once observed that “[i]t is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State.”<sup>17</sup> And the Supreme Court almost seventy years ago described the idea that a person could simultaneously be married in one state and unmarried in another as “the most perplexing and distressing complication[] in the domestic relations of . . . citizens.”<sup>18</sup> Yet that is the situation many married same-sex couples face today.

Conflict of laws is the traditional legal home for interstate marriage recognition, and on a fair reading, mainstream conflicts doctrine frowns on the state of affairs that mini-DOMAs have created, because conflicts doctrine favors validating marriages by looking to the law of the place of celebration. But conflicts doctrine is powerless to do anything about the problem, because it lacks any external enforcement mechanisms. By contrast, the Constitution provides checks and limitations on state practices that invade personal rights. Thus, for a fairer and more rational solution to the marriage recognition problem, we should look to the Due Process Clause.

The Supreme Court declared marriage a fundamental right more than forty years ago.<sup>19</sup> The argument that the right to marry includes same-sex couples has been advanced in recent state and federal litigation, but the question is one that even many thoughtful supporters argue the Court should not and will not settle in the very near future.<sup>20</sup> A separate right of

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14. See *infra* Section IV.C.

15. See *infra* Section IV.A.

16. See *infra* Section II.A.

17. *Zobel v. Williams*, 457 U.S. 55, 76–77 (1982) (O'Connor, J., concurring in the judgment).

18. *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (internal quotation marks omitted).

19. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

20. See, e.g., William Eskridge, *Marriage Equality State by State*, SCOTUSBLOG (Aug. 15, 2011, 1:50 PM), <http://www.scotusblog.com/2011/08/marriage-equality-state-by-state/> (arguing that same-sex marriage is “an issue that now divides the country both intensely and

marriage *recognition*, if advanced in federal litigation, would alleviate an urgent problem while allowing the political and legal debates over same-sex marriage to continue. It would recognize, in a spirit of laboratories-of-democracy-style federalism, that states “should intensely compete to show that [one view of marriage] is more reasonable than the other,”<sup>21</sup> while simultaneously recognizing that states should not be allowed to “inflict serious harm” on couples who are *already* married “in order to make a purely symbolic point.”<sup>22</sup> Alternatively, if the Justices are inclined to decide the question of same-sex marriage sooner rather than later, the principles I discuss in this Article should inform the Court’s consideration, since, in deciding whether same-sex couples have a right to marry, the Court would also be affecting the lives of tens of thousands of couples who are already married.<sup>23</sup>

The right of marriage recognition would be a modest, carefully tailored solution to a pressing problem of interstate relations and human dignity. It would not force any state to create a marriage of which it disapproves, or allow any couple to evade their own state’s marriage laws. It would simply prohibit states from depriving persons of their existing marriages by carving out a discriminatory exception to the well-established rule of marriage recognition. The right would put teeth into the eminently sound and longstanding rule of interstate marriage recognition—a rule that protects individual married persons (along with their children, property, and creditors) as well as the needs of a national marketplace and the rational functioning of a highly mobile society. It would also vindicate the principle, well established in constitutional law, that extant legal statuses and family relationships should not be lightly disrupted by the coercive power of the state.

This Article proceeds in five parts. In Part I, I explain how marriage and family life today are no longer understood through a prism of localism and strict state control. Rather, they are understood, both in law and by society generally, as matters of private ordering, autonomy, and individual rights. In that context, laws that would allow a state to unilaterally void or deny recognition to an extant marriage stand out as highly anomalous.

In Part II, I describe the existing approach to marriage recognition under conflict of laws doctrine. The problem, I explain, is not that modern conflicts doctrine does not prescribe the right rule for recognizing migratory marriages—it does. The problem, rather, is that most states are refusing to follow this rule, and conflicts doctrine has no enforcement mechanisms to back up its policies. Consequently, we cannot deal rationally or fairly with migratory same-sex marriages unless we move beyond the paradigm of con-

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evenly—and is therefore an issue that ought *not* be resolved one way or the other until public preferences become more settled”).

21. ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 153 (2006).

22. *Id.* at 150.

23. I develop this point further in Steve Sanders, *The Right to Marry, and the Right to Remain Married*, SCOTUSBLOG (Aug. 23, 2011, 12:39 PM), <http://www.scotusblog.com/2011/08/the-right-to-marry-and-the-right-to-remain-married/>.

flicts doctrine and accept marriage recognition as an issue of constitutional significance.

In Part III, I consider how marriage *creation* differs from marriage *recognition* and how refusing to license a marriage differs from nullifying one. These differences illuminate the harms that nonrecognition laws inflict on individual interests—harms a state should be required to justify.

In Part IV, I discuss four principles of constitutional due process that support a right of marriage recognition: protection of reasonable expectations, marital and family privacy, respect for settled legal and social practices, and the expectation of proper procedure before a state deprives an individual of liberty. I then explain why, under the intermediate level of scrutiny that is appropriate for a right of marriage recognition, we must evaluate a state's interests in its same-sex marriage policy, not in the abstract, but rather in the specific context of what effect that policy has on *extant* marriages. Examining these interests, I conclude that they either are not important enough to justify marriage nullification, or that the radical step of marriage nullification is not necessary to significantly further them.

Finally, in Part V, I discuss why a right of marriage recognition strikes an appropriate balance for purposes of federalism. It would allow each state to decide whether to provide same-sex marriage for its own domiciliaries, while underscoring the principle that recognizing a sister state's valid marriage is the price of membership in a federal system of equal state sovereigns.

## I. MARRIAGE AND FAMILY LAW: FROM LOCALISM TO LIBERTY

It was once accurate for the Supreme Court to declare, as it did in the late nineteenth century, that “[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created,”<sup>24</sup> and that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”<sup>25</sup> But today marriage and family life are not understood, either in law or everyday life, through a prism of localism and strict state control. Rather, they are predominantly understood as matters that are based on values of private ordering, autonomy, and individual rights.

To lay the groundwork for my arguments about the impotence of conflicts doctrine and the need for a due process right of marriage recognition, it is helpful to briefly review the protections that marriage, family, and intimate relationships already receive under the Constitution as matters of individual liberty, as well as the realities of contemporary state marriage regulation. Although laws that purport to void or deny recognition to disapproved marriages might seem natural and defensible to citizens accustomed

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24. *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878).

25. *In re Burrus*, 136 U.S. 586, 593–94 (1890).



to the heavy hand of the State intervening in their marital and family lives, such a system would be unrecognizable to most Americans today.

*A. Constitutional Protection for Marriage, Family,  
and Intimate Relationships*

The protections of the Due Process Clause for family privacy and autonomy have their origins in the *Lochner*-era cases *Meyer v. Nebraska*<sup>26</sup> and *Pierce v. Society of Sisters*,<sup>27</sup> both of which underscored the right of parents to control the education of their children. The Court spoke broadly of the “liberty guaranteed . . . by the Fourteenth Amendment,” which included the rights “to marry” and “establish a home and bring up children.”<sup>28</sup> In 1944, the Court said that its due process jurisprudence created a “private realm of family life which the state cannot enter.”<sup>29</sup>

The Court declared marriage a fundamental right in 1967 in *Loving v. Virginia*,<sup>30</sup> for the first time striking down state laws that barred entry to marriage based on a particular characteristic (in that case, race). *Loving* was “widely understood as calling into question much state regulation of marriage.”<sup>31</sup> After *Loving*, “[n]o longer [could] it be assumed that states ha[d] autonomy over rules and law governing marital status.”<sup>32</sup> The Court struck down other state-law marriage restrictions in *Zablocki v. Redhail*<sup>33</sup> (1978) and *Turner v. Safley*<sup>34</sup> (1987).

Two years before granting constitutional protection to the right to get married, the Court in *Griswold v. Connecticut*<sup>35</sup> laid the foundation for the modern right of privacy by protecting an existing marital relationship—something the Court said was “intimate to the degree of being sacred”<sup>36</sup>—against the state’s coercive moral regulation. Connecticut’s ban on birth control for married couples could not stand, the Court said, “in light of the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by

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26. 262 U.S. 390 (1923).

27. 268 U.S. 510 (1925).

28. *Meyer*, 262 U.S. at 399.

29. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

30. 388 U.S. 1 (1967).

31. Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 668 (1976).

32. Henry H. Foster, Jr., *Marriage: A “Basic Civil Right of Man,”* 37 FORDHAM L. REV. 51, 51 (1968).

33. 434 U.S. 374 (1978) (striking down Wisconsin statute that prohibited deadbeat fathers from getting married without court approval).

34. 482 U.S. 78 (1987) (striking down regulation which prohibited prisoners from marrying other inmates or civilians).

35. 381 U.S. 479 (1965).

36. *Griswold*, 381 U.S. at 486.

means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’”<sup>37</sup>

Together, *Griswold* and *Loving* signaled that “traditional state control of the marital status ha[d] to give way to current notions of individual liberty and the right of privacy.”<sup>38</sup> With these decisions, as well as the changes in society that they acknowledged,<sup>39</sup> “the law . . . retreated from a confidently moral view of marriage” to an understanding of marriage as “a private relationship which the law has no right to regulate and whose consequences affect only the parties to the marriage, not the general public.”<sup>40</sup> “Where mid-nineteenth-century judges and other public spokesmen had hardly been able to speak of marriage without mentioning Christian morality, mid-twentieth-century discourse saw the hallmarks of the institution in liberty and privacy, consent and freedom.”<sup>41</sup>

Arguably, the Court’s application of the Constitution to curb states’ use of marital law to enact moral codes actually began in 1942 with *Williams v. North Carolina*, which held that once a divorce is effective in one state, it must be given full faith and credit in every other state.<sup>42</sup> As Ann Estin argues, *Williams* began a series of divorce-related decisions in which the Court “severed the connection between state power and marital status, changing the shape of both divorce law and American federalism.”<sup>43</sup> By giving individuals the power to choose which jurisdiction would control their marital status, “the divorce cases fundamentally altered state power to set the normative boundaries of family life”<sup>44</sup> and “moved individual interests to the center of marital status determinations.”<sup>45</sup>

Besides constitutionalizing marriage and divorce, the Court gave protection under the Due Process Clause to matters of family privacy and autonomy, and also extended liberty and privacy guarantees to non-marital relationships. *Eisenstadt v. Baird*<sup>46</sup> extended the right of access to birth control to unmarried persons, explaining that “the marital couple is not an independent entity . . . but an association of two individuals,” and that the right of privacy protected “the individual” against “unwarranted governmental intrusion” into personal

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37. *Id.* at 485 (quoting *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964)).

38. Foster, *supra* note 32, at 51.

39. Marriage historian Nancy Cott argues that far from imposing its own values, the Court was “just keeping pace with the upheavals in society.” NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 199 (2000).

40. Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 243–44 (2003).

41. COTT, *supra* note 39, at 197.

42. 317 U.S. 287, 296–97 (1942).

43. Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 382 (2007).

44. *Id.* at 383.

45. *Id.* at 396.

46. 405 U.S. 438 (1972).

relationships.<sup>47</sup> *Stanley v. Illinois* held that a state could not automatically presume that an unwed father was an unfit parent, emphasizing that “familial bonds” in unmarried households are “often as warm, enduring, and important as those” in married households.<sup>48</sup> *Roe v. Wade* protected the right to abortion.<sup>49</sup> And in 1977, Justice Powell, writing for the plurality in *Moore v. City of East Cleveland*,<sup>50</sup> a case about the right of family members to live together, synthesized a principle from the Court’s due process cases that dated back to *Meyer*<sup>51</sup>: when government “undertakes . . . intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate.”<sup>52</sup> Accordingly, “when the government intrudes on choices concerning family living arrangements, th[e] Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”<sup>53</sup>

Again reviewing its Due Process Clause jurisprudence in 1992, the Court said that the Constitution “affords . . . protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” because these things “involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”<sup>54</sup> The Constitution thereby circumscribes the power of states to dictate the terms of marriage and family life based on the preferences or moral views of a governing majority: “Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>55</sup>

In 2003, the Court brought gay and lesbian relationships under the protection of the Due Process Clause in *Lawrence v. Texas*,<sup>56</sup> striking down sodomy laws in language that emphasized individual liberty and admonishing “attempts by the State . . . to define the meaning of [a] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”<sup>57</sup>

Thus, the Court’s modern due process jurisprudence does not treat marriage, family, and intimate relationships as discrete subjects. Rather, it protects, at a higher level of abstraction, the privacy and “personal choices” that are inherent in all of these matters, and it requires justification when

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47. *Eisenstadt*, 405 U.S. at 453.

48. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

49. 410 U.S. 113 (1973).

50. 431 U.S. 494 (1977) (plurality opinion).

51. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

52. *Moore*, 431 U.S. at 499.

53. *Id.*

54. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

55. *Id.*

56. 539 U.S. 558 (2003).

57. *Lawrence*, 539 U.S. at 567.

government interferes with them. This understanding of due process doctrine informs the arguments I offer later in this Article.<sup>58</sup>

### B. State Regulation of Marriage

During the same time that the Supreme Court was underscoring the individual liberties inherent in marriage, family life, and intimate relationships, states were “in the process of divesting [themselves] of [the] marriage regulation business,” and “a major alteration in the posture of the State with respect to the family [was beginning] to emerge.”<sup>59</sup> The protection of autonomy for families and individuals was becoming one of the core themes of modern family law.<sup>60</sup>

Traditionally, state regulation of existing marriages was “justified in order to protect and preserve [the] essential role of the family by ensuring a strong family system,” including “securing the continued welfare of . . . citizens by making them legally responsible for one another” and “ensuring that children are properly cared for.”<sup>61</sup> While marriage continues to serve those functions today, existing marriages are not pervasively regulated by the state—indeed, they are hardly regulated at all. Instead, marriage law in the United States today reflects values of autonomy rather than conformity: lawmakers “treat marriage as a private and all-but-inscrutable relationship,”<sup>62</sup> and thus there is “little intervention in the daily workings of an intact marriage.”<sup>63</sup> Actual intervention is limited mostly to instances of “abuse or neglect, and in the decisions regarding property, child support and child custody upon a petition for dissolution.”<sup>64</sup> Most of the “regulation” of marriage actually involves the provision of various state-created rights, privileges, and other marital incidents.<sup>65</sup> Extant marriages are not subject to the state’s surveillance, approval, or revalidation.

The emergence of same-sex marriage into the mainstream of American society and law has sparked a backlash of what we might call marriage neo-classicism. Natural law theorists as well as conservative lawmakers and commentators have attempted to revive notions of marriage as something “ordained by God” and founded on traditional gender roles and heterosexual

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58. See *infra* Part IV.

59. Glendon, *supra* note 31, at 666.

60. See CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 180–184 (3d ed. 2007).

61. Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1242–45 (1974).

62. Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 323 (2004).

63. Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255, 267 (2002).

64. *Id.*

65. See *infra* notes 337–346 and accompanying text.

procreation.<sup>66</sup> The clear implication of this neoclassicism is that voiding or denying recognition to disfavored marriages is a reasonable exercise of a state's traditional police powers to regulate marriage and family law. But the neoclassical view of the relationship between marriage and the state is not an accurate description of current legal and social reality, and so it does not provide an adequate justification for nonrecognition laws.

In summary, marriage and family are not understood today as merely "state legislatures' . . . political creation."<sup>67</sup> "Despite the survival of old rhetoric assigning the family to local authority, the constitutional model that consigned the family to local control was effectively discarded" with the divorce cases starting in the 1940s,<sup>68</sup> and marriage, family, and intimate relationships are now encompassed within constitutional liberty and privacy guarantees. Further, the most important purposes of modern state marriage regulation and of family law generally are not to enforce conformity to state-mandated norms, but to protect the integrity of extant marriages, the dignity and privacy of spouses, and the autonomy and private ordering of families. None of this is to say that the Court's marriage and family privacy jurisprudence is easily applied to novel situations.<sup>69</sup> But it does mean, at the very least, that a state's disruption of intact marital and family relationships—and that is what mini-DOMAs do, I believe, when they purport to convert married persons to the status of legal strangers—should be regarded as an extraordinary intervention.

## II. MARRIAGE AND CONFLICT OF LAWS

Conflict of laws is the traditional doctrinal home for questions of interstate marriage recognition. To understand why marriage recognition is a proper subject for constitutional law, it is first necessary to understand why the conflict of laws approach is broken. Modern conflicts doctrine provides a sound rule: a state should recognize a migratory marriage that was procured in good faith, even if that state itself would not have licensed

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66. See, e.g., Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313, 316, 321–22 (2008) (describing "man-woman marriage" as "ancient" and arguing that it "uniquely" produces various "social goods," such as "bridging the male-female divide" and giving "[s]ocial and official endorsement" to "heterosexual intercourse[, which] society may rationally value above all other such forms"). By contrast, other scholars have warned about "[t]he hazards of importing" male-dominated, nineteenth-century conceptions about marriage "to our twenty-first century moment." Mae Kuykendall & Adam Candeub, *Symposium Overview: Perspectives on Innovative Marriage Procedure*, 2011 MICH. ST. L. REV. 1, 11–12 (2011).

67. See COTT, *supra* note 39, at 54 (describing nineteenth-century conceptions of marriage).

68. Estin, *supra* note 43, at 383.

69. See David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 531–32 (2000) ("More than seventy-five years after the Supreme Court first began to carve out 'a private realm of family life which the state cannot enter,' the boundaries of that constitutional sanctuary remain decidedly unclear." (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842 (1977))).

the marriage. But conflicts doctrine is, in the end, nothing more than a set of rules developed by scholars and judges, with no enforcement mechanisms. Conflicts rules, no matter how reasonable and necessary to promote comity and fairness, can always be overridden by legislation or state constitutional amendment—which is what has happened in the last two decades with the emergence of mini-DOMAs. State court judges are reluctant to overturn or give narrowing interpretations to such measures—and where mini-DOMAs are embedded in state constitutions, as most now are, judges are effectively disabled from doing so. In this Part, I describe the prevailing rule for recognizing marriages, how same-sex marriages have been excluded from that rule, and why we should not rely on conflicts doctrine to solve the pressing social and legal problem of same-sex marriage nullification.

### A. *The Place of Celebration Rule*

It is a longstanding matter of legal and social practice that “[o]rdinarily, marriages that are valid where they are celebrated are valid everywhere, for all purposes.”<sup>70</sup> Common law commentators, modern conflicts authorities, and courts at all levels have agreed that it is in everyone’s interests—married individuals, society, and the interstate system—for states to recognize each other’s marriages. This principle is embodied in the so-called “place of celebration rule,” which holds that the validity of a marriage should be governed by the law of the jurisdiction where it was created—usually the marital parties’ domicile. As one federal court put it succinctly, the “policy of the civilized world[] is to sustain marriages, not to upset them.”<sup>71</sup>

Recognizing that every state is entitled to govern its own domiciliaries, the place of celebration rule traditionally did not apply to so-called evasive marriages, those where the couple left their domicile briefly to procure a marriage that their home state would not have licensed.<sup>72</sup> Accordingly, my argument in this Article concerns only nonevasive marriages, i.e., where the couple marries in their state of domicile or in a state whose marriage law is consistent with that of their domicile. Conceptually, evasive marriages are essentially about the right to marry in the first instance. When an Indiana couple flies to Boston for the weekend to get married, they are in some sense engaging in an act of civil disobedience; they are making a statement about the oppressiveness of their own state’s marriage law. But because they live under the laws of Indiana, they have no reasonable expectation from

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70. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 922 (1998).

71. *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949).

72. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”). This is not to say that some states did not still go ahead and recognize evasive marriages under the place of celebration rule, but just that they were less likely to do so.

the outset that Indiana will honor their marriage. By contrast, if the same couple lives and marries in Massachusetts and then later moves to Indiana, they have already become vested in their marriage and have acquired a reasonable expectation that their marriage should continue indefinitely.<sup>73</sup> (I explain further in Part III how marriage *creation* differs from marriage *nullification*.) And so the constitutional rule I propose would preserve the traditional power of states to control the criteria for marriage entry for their own domiciliaries. But it would prescribe that once a marriage is created, it gives rise to important reliance and privacy interests that must be weighed against the state's own interests in its marriage policy.<sup>74</sup>

The place of celebration rule is a voluntary rule of comity, not a matter of constitutional full faith and credit,<sup>75</sup> but it is recognized in every state,<sup>76</sup> and thus it has become a defining feature and basic incident of American marriage. It enacts the commonsense principle that “[b]ecause marriage is a continuing relationship, there is normally a need that its existence be subject to regulation by one law without occasion for repeated redetermination of the validity.”<sup>77</sup> It recognizes that individuals order their lives based on their marital status and “need to know reliably and certainly, and at once, whether they are married or not. It would be messy to have a couple married in one state and not in another.”<sup>78</sup> As one state high court has put it, “uniformity in the recognition of the marital status” is important “so that persons legally married according to the laws of one State will not be held to be living in adultery in another State, and that children begotten in lawful wedlock in one State will not be held illegitimate in another.”<sup>79</sup> Uniform marriage recognition “confirms the parties’ expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state.”<sup>80</sup> Such problems include the possibility that an individual “who undertake[s] the obligations of marriage in” a state with favorable law might later “escape those obligations simply by relocating to another state” that regards the marriage as without legal effect.<sup>81</sup>

73. See *infra* Section IV.B.1.

74. See *infra* Section IV.C.

75. See Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 353–58 (2005).

76. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 461 (2005) (stating that, historically, “[a]ll jurisdictions followed some version of *lex loci contractus* in evaluating the validity of a marriage”).

77. SCOLES ET AL., *supra* note 11, at 560.

78. LUTHER L. McDUGAL III ET AL., *AMERICAN CONFLICTS LAW* 713 (5th ed. 2001).

79. *Henderson v. Henderson*, 87 A.2d 403, 408 (Md. 1952).

80. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* 398 (3d ed. 2002).

81. Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 1, 6 (2009).

Such a person could flee with marital property, marry someone else, and end up a bigamist, at least in the eyes of the original marital domicile.<sup>82</sup>

The place of celebration rule was well established at common law. A New York court in 1854 said it went beyond interstate comity and was a “universal practice of civilized nations.”<sup>83</sup> Writing more than a century ago, Joel Prentiss Bishop characterized marriage as a form of vested right that went with the couple wherever they traveled:

[T]here is in the nature of things no way in which marriage can be an international institution, so that whatever parties are held to be married in one country will be held the same in every other, except by referring the question to the law of the place in which the celebration transpired. This view does not involve . . . a submission by one country to the laws of other countries; it is simply that, when parties enter it from abroad, they may bring with them whatever they had acquired abroad,—the foreign law being looked into only to ascertain whether or not the thing claimed constitutes such acquisition.<sup>84</sup>

Bishop explained that certainty in marriage was a matter of the highest order for both the parties and the broader society. The result of the place of celebration rule

is that, for the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion, for everything held dear by the race of man in common, it is necessary there should be one universal rule whereby to determine whether parties are to be regarded as married or not[.]<sup>85</sup>

Without such a rule, Bishop said, “no end can be predicted to the confusion which will ensue.”<sup>86</sup>

### B. *The Public Policy Exception*

Although it is supported by sensible policies and humane values, the place of celebration rule is only a principle of voluntary comity with no external enforcement mechanism. Under an escape device known as the “public policy exception,” a state can, in practice, refuse to recognize any marriage it finds distasteful, based on nothing more than the ability of a governing majority to enact a nonrecognition statute or constitutional amendment.

At common law, the public policy exception was primarily intended to bar recognition of polygamous or incestuous unions<sup>87</sup>—“marriages which

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82. See *id.* at 13–18.

83. *Cropsey v. Ogden*, 11 N.Y. 228, 236 (1854).

84. 1 JOEL PRENTISS BISHOP, *NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION* § 851 (1891).

85. *Id.* § 856.

86. *Id.*

87. Grossman, *supra* note 76, at 435.



by the common voice of civilized nations [were regarded as] vicious past toleration.”<sup>88</sup> It was not intended to bar marriages that were merely “contrary to the general law of the State in which the question arises.”<sup>89</sup> The other major purpose of the public policy exception was to bar recognition of evasive marriages.<sup>90</sup>

As an escape device to avoid a general conflicts rule, the public policy exception is not unique to marriage, and it was traditionally understood as a narrow, judge-made exception to the general expectation that a forum court would enforce rights acquired under the laws of another state. Judge Cardozo said that the exception should be permitted only if the foreign right “in its nature offends [the forum state’s] sense of justice or menaces the public welfare,” or if it “violate[s] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”<sup>91</sup> The simple fact that the forum’s “own scheme of legislation may be different” was not enough to trigger the exception.<sup>92</sup> “If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him.”<sup>93</sup> As to marriage specifically, it was long similarly understood that the public policy exception should be “sparingly applied,”<sup>94</sup> and that a valid marriage should be denied recognition “only where there is rather violent conflict between the enjoyment of an incident [of marriage] and the assumed social order where enjoyment is sought.”<sup>95</sup>

Prior to the advent of legal same-sex marriage less than ten years ago, did states use the public policy exception in a principled and consistent way to guard their own definitions of marriage? The evidence suggests that the answer is no. Indeed, “until the recent hysteria associated with same sex marriage, the public policy exception was fast becoming obsolete.”<sup>96</sup> In a 1996 study, Barbara Cox and a team of researchers found that the public policy exception, while frequently mentioned in court decisions, was rarely actually applied to invalidate a marriage that did not involve evasion of the domicile’s marriage laws.<sup>97</sup> Cox and her colleagues concluded:

[C]ourts do not use a public policy exception to refuse to validate an out-of-state marriage even when the domicile has an explicit statutory prohibition against the marriage in question. Instead, courts repeatedly indicate that they have the discretion to use such a public policy exception but then validate the

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88. BISHOP, *supra* note 84, § 857.

89. *Id.* § 858.

90. Grossman, *supra* note 76, at 435.

91. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201–02 (N.Y. 1918).

92. *Id.* at 201.

93. *Id.*

94. Borchers, *supra* note 75, at 354.

95. SCOLES ET AL., *supra* note 11, at 561.

96. Singer, *supra* note 81, at 40.

97. See Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996).

out-of-state marriage following the general rule in favor of recognition. Although a few states use the exception consistently, virtually all the rest recognize the existence of such an exception but rarely use it.<sup>98</sup>

Before same-sex marriage, the strongest marriage taboo concerned interracial marriages, or “miscegenation,” which thirteen states still prohibited prior to *Loving*. Andrew Koppelman observes that “[i]t would . . . be hard to argue that the southern states’ public policy against miscegenation was *less* strong than modern public policies against same-sex marriage.”<sup>99</sup> Indeed, interracial unions were often criminalized. Yet Koppelman found that,

even in this charged context, the southern states did not make a blunderbuss of their own public policy. Their decisions concerning the validity of interracial marriages were surprisingly fact-dependent. They did not utterly disregard the interests of the parties to the forbidden marriages or of the states that had recognized such marriages, but weighed these against the countervailing interests of the forum.<sup>100</sup>

Where migratory marriages were concerned, Koppelman found that southern legal authorities were, at worst, “divided.”<sup>101</sup> Only two state statutes and four reported cases addressed the issue.<sup>102</sup> “One of the statutes clearly permitted migratory marriages, and the other was ambiguous but quite possibly did so.”<sup>103</sup>

What about polygamy and incest, the other two marriage categories where the public policy exception historically was thought to be justified? No American state has ever licensed polygamous marriages, and none will do so anytime soon. While polyamory has become something of a pop culture phenomenon,<sup>104</sup> there is no social movement for polygamist marriage equality and none is likely to appear anytime soon. To the extent that cases involving recognition of polygamous marriages have arisen, they have mostly involved marriages performed on Native American reservations, the only jurisdictions within the territorial United States where polygamous unions have ever been legally valid.<sup>105</sup> Koppelman reports that “when such practices

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98. *Id.* at 66–67; see also F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 568 (2001) (observing that “courts frequently uphold marriages that are valid where made but barred by the internal domicile law”).

99. KOPPELMAN, *supra* note 21, at 36.

100. *Id.*

101. *Id.* at 44.

102. *Id.* at 43.

103. *Id.*

104. See Jessica Bennett, *Only You. And You. And You: Polyamory—Relationships with Multiple, Mutually Consenting Partners—Has a Coming-Out Party*, NEWSWEEK, July 28, 2009, available at <http://www.thedailybeast.com/newsweek/2009/07/28/only-you-and-you-and-you.html>.

105. KOPPELMAN, *supra* note 21, at 30.

were questioned in litigation, the attitude of state courts was uniformly one of 'casual tolerance.'"<sup>106</sup>

As for incest, no state has ever licensed parent-child or sibling marriages; "incest" in American cases has "involved marriages between first cousins, aunts and nephews, uncles and nieces, or even more remote relations."<sup>107</sup> Here, too, the public policy exception has not had much bite: Koppelman finds that "[a]lthough earlier cases tended to invalidate such marriages, later ones have tended to uphold them."<sup>108</sup> In *In re May's Estate*,<sup>109</sup> New York recognized a Rhode Island marriage between an uncle and niece even though the marriage violated New York's incest laws.<sup>110</sup> More recently, a Louisiana appellate court held that an Iranian marriage between first cousins was valid in Louisiana and not a violation of the state's strong public policy.<sup>111</sup> (At the same time, it should be noted, Louisiana has one of the nation's harshest laws against recognition of same-sex relationships in any form.<sup>112</sup>)

To sum up, while states nominally retain the right to bar recognition of strongly disapproved marriages, in practice the modern trend has been in favor of validating marriages whenever possible. Under the rule of the *Second Restatement of Conflict of Laws*, "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage *at the time of the marriage*."<sup>113</sup> This policy underscores the place of celebration rule and allows use of the public policy exception only for evasive marriages (at the time of the marriage, it is the couple's domicile that has the "most significant relationship"). Only with same-sex marriages have states imposed emphatic and inflexible rules of nonrecognition.

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106. *Id.* (quoting 2 ALBERT A. EHRENZWEIG & ERIK JAYME, PRIVATE INTERNATIONAL LAW 166 (1973) and collecting cases and other authorities). As one case cited by Koppelman explained, "[A]mong these Indians polygamous marriages have always been recognized as valid," and "[w]e cannot interfere with the validity of such marriages without subjecting them to rules of law which never bound them." *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605-06 (Mich. 1889).

107. KOPPELMAN, *supra* note 21, at 32.

108. *Id.* (citing LENNART PÅLSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS 75-76 (1981)).

109. 114 N.E.2d 4 (N.Y. 1953).

110. *In re May's Estate*, 114 N.E.2d at 7.

111. *Ghassemi v. Ghassemi*, 998 So. 2d 731, 749-50 (La. Ct. App. 2008).

112. The Louisiana Constitution not only provides that marriage "shall consist only of the union of one man and one woman," it also bars recognition of civil unions, domestic partnerships, and possibly private contractual arrangements between same-sex partners by declaring that "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." LA. CONST. art. XII, § 15.

113. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (emphasis added).

*C. Nonrecognition of Same-Sex Marriages*

Legally, politically, and culturally, same-sex marriage has gone mainstream. Public opinion has shifted dramatically in recent years, and a majority of Americans now say that they support equal marriage rights for gays and lesbians.<sup>114</sup> Two of the nation's most prominent lawyers—a liberal Democrat and a conservative Republican—have teamed up to challenge California's constitutional mini-DOMA.<sup>115</sup> The current presidential administration has taken the official stance that sexual orientation should get heightened scrutiny under the Equal Protection Clause and that, under this standard, the federal DOMA is unconstitutional.<sup>116</sup> In addition to the six states plus the District of Columbia where same-sex marriage is now legal, an additional nine states provide state-level spousal rights in the form of civil unions or registered domestic partnerships.<sup>117</sup> Yet despite all this mainstreaming, forty-one states maintain statutes or constitutional amendments categorically barring same-sex marriage, the vast majority of which would also void or deny recognition to existing marriages.<sup>118</sup> How did we get here?

In 1993, the Hawaii Supreme Court became the first state high court to conclude that the denial of same-sex marriage implicated guarantees in its state constitution.<sup>119</sup> Hawaii voters then amended their constitution to empower legislators to prohibit same-sex marriage before the court had a chance to finalize that decision.<sup>120</sup> But for a while, it looked as though gays and lesbians might be able to marry in Hawaii and then return to the mainland with the expectation that their marriages would be honored in their domiciles.

This concern over a flood of evasive marriages generated the first wave of mini-DOMAs. Congress also enacted the 1996 Defense of Marriage Act ("DOMA"), which barred federal recognition of same-sex marriages and declared that no state was required "to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws

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114. See Nate Silver, *Gay Marriage Opponents Now in Minority*, NYTIMES.COM (Apr. 20, 2011, 11:18 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority/> (reporting on "the fourth credible poll in the past eight months to show an outright majority of Americans in favor of gay marriage").

115. Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 40, available at [http://www.newyorker.com/reporting/2010/01/18/100118fa\\_fact\\_talbot](http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot).

116. Steve Sanders, *DOJ Abandons Defense of the 'Defense of Marriage Act': First Thoughts*, U. CHI. LAW SCH. FAC. BLOG (Feb. 23, 2011, 2:06 PM), <http://uchicagolaw.typepad.com/faculty/2011/02/doj-abandons-defense-of-the-defense-of-marriage-act-first-thoughts.html>.

117. See *Marriage Equality & Other Relationship Recognition Laws*, HUM. RTS. CAMPAIGN (July 6, 2011), [http://www.hrc.org/documents/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf).

118. See *supra* notes 5–6 and accompanying text.

119. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

120. See HAW. CONST. art. 1, § 23.

of such other State.”<sup>121</sup> More mini-DOMAs—now more often in the form of state constitutional amendments, and thereby intended to preclude or limit review by state judiciaries—were passed after Massachusetts legalized same-sex marriage in 2003 and Republican political operatives decided to emphasize same-sex marriage as a wedge issue in the 2004 and 2006 elections. Thus, as a practical matter, the “sensible approach to [same-sex marriage] recognition,” which would weigh the necessity and importance of the state’s interest in nonrecognition against the couple’s own interests in the integrity of their family life, “is [now] precluded in most jurisdictions.”<sup>122</sup>

A number of conflicts commentators have argued that states are abusing the public policy exception (which, in modern practice, has come to refer to all forms of marriage nonrecognition, whether by judicial decision or majoritarian lawmaking).<sup>123</sup> Linda Silberman maintains that “[s]tates with ‘defense of marriage’ acts should not further their own policies at the expense of the legitimate interests of other states and the reasonable expectations of the parties” and that “states that choose to prohibit same-sex marriage should not undermine the rights of newly-arriving couples from established marriages in other states that bestowed marital status upon their residents and domiciliaries.”<sup>124</sup> Similarly, Koppelman maintains that a state may not invoke the public policy exception merely because it finds another state’s law “repugnant”: “Since the repugnance rationale for the public policy rule makes [national] uniformity impossible, it can have no legitimate place in interstate choice of law decisions, such as whether to recognize a marriage valid in another state.”<sup>125</sup> Such a “rule could only be justified by relying on the . . . rationale . . . that the foreign state’s law ought not to exist . . . . [L]aws with this basis have no place in a federal system.”<sup>126</sup> And Larry Kramer argues that the public policy exception as we know it today violates the Full Faith and Credit Clause<sup>127</sup> because it has ballooned from a narrow, judge-made tool into a capacious loophole that allows states to ignore the laws of other states out of mere disagreement with them.<sup>128</sup>

Indeed, measured by the standards that traditionally governed the public policy exception, mini-DOMAs are hard to justify. While same-sex marriage will continue to be a subject of keen legal and political disagreement, as an

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121. 28 U.S.C. § 1738C (2006).

122. Grossman, *supra* note 76, at 436–37.

123. E.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1972 (1997) (“After all, it makes absolutely no difference from the perspective of either the parties or other states whether the decision that some law is too offensive to apply comes from a state’s courts or from its legislature.”).

124. Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2214 (2005).

125. KOPPELMAN, *supra* note 21, at 26.

126. Koppelman, *supra* note 70, at 964.

127. U.S. CONST. art. 4, § 1.

128. See Kramer, *supra* note 123.

objective matter it can no longer be regarded as something that “by the common voice of civilized nations” is “vicious past toleration,” “menaces the public welfare,” or “violate[s] some fundamental principle of justice”<sup>129</sup>—certainly not when nationwide polls find majority support for marriage equality, when the government routinely reports statistics on such marriages, or when Republican and Democratic appointees to a state supreme court in the nation’s heartland come together to unanimously strike down a marriage discrimination law, as they did in Iowa in 2009.<sup>130</sup> L. Lynn Hogue notes that, to the extent that contemporary cases uphold the public policy exception to marriage recognition, these cases are “cloaked in nineteenth-century moral and religious language that no longer resonates in our pluralistic, secular humanistic society irrespective of how closely it may in fact track widely held contemporary values.”<sup>131</sup> (Hogue, it should be noted, is a conservative academic and activist who is not a fan of same-sex marriage.) Such “[r]eligious and moral sentiment,” he says, “cannot provide an adequate contemporary normative framework from which to divine public policy.”<sup>132</sup>

#### D. Same-Sex Marriage and the Limits of Conflicts Doctrine

As we have seen, modern conflicts doctrine provides a sensible rule that nonevasive marriages should be recognized, and if states simply followed that rule, we would not need to think about the constitutional implications of nonrecognition. But in most states, the place of celebration rule has been overridden by categorical statutes and constitutional amendments. These mini-DOMAs inflict harms not only on married couples but also on their children, property, and on any market or sector of the broader society that depends on the basic expectation of certainty and stability in legal relationships. As merely a body of legal rules and scholarship, conflicts doctrine is powerless to do anything about this problem. Even where they are not precluded from acting by constitutional amendment, state judges have shown no inclination to read these laws in light of modern conflicts principles and thus moderate the effect of mini-DOMAs on migratory couples. In short, the conflict of laws approach to marriage recognition has been rendered impotent by majoritarian muscle-flexing and has been overtaken by political and social realities.

Koppelman, who is one of the most prominent and prolific scholars on this subject, maintains faith in conflicts doctrine to eventually deal rationally with same-sex marriage, noting that “[t]here is a well-developed body of law on the question of whether and when to recognize extraterritorial marriages

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129. See *supra* notes 88–91 and accompanying text.

130. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

131. L. Lynn Hogue, *Examining a Strand of the Public Policy Exception with Constitutional Underpinnings: How the “Foreign Marriage Recognition Exception” Affects the Interjurisdictional Recognition of Same-Sex “Marriage”*, 38 CREIGHTON L. REV. 449, 452 (2005).

132. *Id.*

that are contrary to the forum's public policy."<sup>133</sup> Yet for interracial marriages before *Loving*, which Koppelman regards as the most appropriate analogy to same-sex marriage,<sup>134</sup> there is only one reported case—from 1877—that actually upheld a nonevasive migratory marriage while the parties were both alive and seeking to live as a married couple in the new state.<sup>135</sup> Another decision, in an estate dispute from 1871, recognized a marriage after the husband's death.<sup>136</sup> One other case discussed by Koppelman rejected recognition of a migratory interracial marriage.<sup>137</sup>

Koppelman also suggests that the harsh effects of nonrecognition laws could be moderated by narrow judicial interpretation—that is, by reading them as applicable only to evasive marriages<sup>138</sup>—but he concedes, “[A] lot of use will have to be made of this kind of narrowing device because laws that lash out wildly at gay people seem to keep getting passed.”<sup>139</sup> The problem is that, even though tens of thousands of same-sex couples have married since 2004, there is no evidence that such judicial narrowing is taking place.<sup>140</sup>

As a potential compromise approach, Koppelman also advocates “nuanced conflicts rules,”<sup>141</sup> specifically an “incidents approach” where states would not be required to recognize same-sex marriages as such but where they would be required to allow the couple “[a]ny right or obligation of marriage that can be recharacterized as a nonmarital right—such as a right to contract, or a parent-child relation, or an obligation created by a judicial judgment.”<sup>142</sup> Notwithstanding the goodwill and political realism behind

133. Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2144 (2005).

134. See *supra* note 99 and accompanying text.

135. See KOPPELMAN, *supra* note 21, at 28–29, 42–43 (discussing *State v. Ross*, 76 N.C. 242 (1877)).

136. See *id.* at 44 (discussing *Bonds v. Foster*, 36 Tex. 68 (1871)).

137. See *id.* at 46–47 (discussing *State v. Bell*, 66 Tenn. 9 (1872)).

138. *Id.* at 151; see also Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, the Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT'L L.J. 105, 135 (2010) (“[M]ini-DOMAs should not be presumed to affect the recognition of extraterritorial same-sex marriages, unless they explicitly so state.”).

139. KOPPELMAN, *supra* note 21, at 151. Indeed, three new state constitutional mini-DOMAs were passed in 2008 in Arizona, California, and Florida. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 1.

140. See Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 LAW & CONTEMP. PROBS., Summer 2008, at 153, 161 (“Although the conflicts scholars produce sophisticated arguments . . . the courts by and large ignore these doctrinal disputes and arguments, deciding the cases on the basis of a state's stated opposition to same-sex marriage.”). In the end, it is “the underlying politics of same-sex marriage,” not any legal rule or doctrine, that is “dispositive.” *Id.*

141. KOPPELMAN, *supra* note 21, at 152.

142. *Id.* at 110. Other scholars have proposed similar complicated compromises. See, e.g., Buckley & Ribstein, *supra* note 98, at 561, 609 (proposing that states enforce the “contractual elements of marriages solemnized elsewhere” but not the status of marriage or its “local subsidies and tax and regulatory effects”).

such compromises, sorting out marital from nonmarital incidents would be complicated and require an enormous amount of state-by-state litigation. And again, there is no evidence so far that courts are interested in creatively working around nonrecognition laws.<sup>143</sup>

The bigger problem with such compromises is that they reinforce the idea that an extant same-sex marriage is inherently unequal to or less valuable than an opposite-sex marriage and less worthy of honor and protection. Intermediate, compromise steps such as civil unions may make sense as states continue debating whether to *create* same-sex marriages. But once a valid marriage has been created, the idea of compromising over how much recognition it should receive is foreign to contemporary American experience. Moreover, such compromises over recognition are reasonable only if we accept the premise that “[s]ame-sex marriage is not likely to spread very widely in the United States in the near future” because “[p]ublic opinion is too strongly against it.”<sup>144</sup> In fact, this premise has not held up. At the time Koppelman wrote in 2006, one state (Massachusetts) had authorized same-sex marriage. Today the number is six plus the District of Columbia. As public opinion becomes more supportive of same-sex marriage, that number is likely to grow.

#### E. Conflict of Laws, State Interests, and Individual Rights

As a bridge to my argument that we should look to the Due Process Clause to protect extant same-sex marriages, it is helpful to consider why conflict of laws is not an adequate paradigm for thinking seriously about the limits of state power over marriages and families.

I have argued elsewhere that conflicts doctrine, along with the related doctrines of constitutional and statutory full faith and credit, constitute a “state interests paradigm” that focuses on the interests of states to the exclusion of considerations of individual rights.<sup>145</sup> Conflicts doctrine is “preoccupied with choosing the proper *state* to supply the applicable law, rather than directly searching for the proper *law* or, much less, for the proper *result*.”<sup>146</sup> Unlike substantive law, it only “aims at the *spatially* best solution,” not “the *materially* best solution.”<sup>147</sup> Consequently, “[w]hen we

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143. We should also remember that “[t]he courts of each state are active participants in the formulation and implementation of local policies. To place in their hands extensive responsibility for deciding when those policies will yield to and when they will prevail over the competing policies of sister states seems unsound.” William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 23 (1963).

144. KOPPELMAN, *supra* note 21, at 152.

145. See Steve Sanders, *Interstate Recognition of Parent-Child Relationships: The Limits of the State Interests Paradigm and the Role of Due Process*, 2011 U. CHI. LEGAL F. 233, 234 (2011).

146. SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION* 405 (2006).

147. *Id.* at 406 (quoting Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 616 (1979)) (internal quotation marks omitted).



think about the conflict of laws, we always think in terms of states and their relations with each other,” and “[w]hat we tend to forget is that choice of law, as every other field of law, ultimately pertains to human relations.”<sup>148</sup> Because conflicts doctrine has its roots in international law, “[s]tate relations are considered to be more important than private relations and therefore are superposed to them.”<sup>149</sup> Viewing conflicts exclusively as a matter of “battles between states . . . closes the mind to the role of the individual,”<sup>150</sup> even though “[i]t is the individuals who will feel the consequences of the application of a particular law, and it is their interests that are most directly concerned by the outcome of the dispute.”<sup>151</sup>

Several noted conflicts scholars have wrestled with this problem, albeit not in the specific context of same-sex marriage. As Lea Brilmayer writes, “One is hard put to find a serious discussion of ‘rights’ in the current academic literature or judicial discussions of choice of law. With a few notable exceptions, the academic talk is all about ‘policies,’ or ‘interests,’ or ‘functional analysis.’”<sup>152</sup> This is an important problem, Brilmayer argues, because

[c]hoosing to talk in terms of rights rather than policies or interests represents a fundamental jurisprudential commitment which is reflected in the way that concrete problems are resolved . . . Rights impose limits on state authority, protecting individuals from being forced to sacrifice for the good of society as a whole. They reflect a notion of individual desert that stands above the instrumental advantage to be achieved by the application of some particular state’s substantive law.<sup>153</sup>

In a similar vein, Terry Kogan has written that “the most important constitutional values at issue in choice of law are those related to fairness to the litigants, not those aimed at accommodating state policy interests.”<sup>154</sup> And Scott Fruehwald has observed that the minimal constraints that the Supreme Court has placed on state choice of law have resulted in a privileging of “state interests over individual liberty interests, contravening the purpose of the Due Process Clause—the protection of individual liberty.”<sup>155</sup>

To be sure, the domestic relations branch of conflicts doctrine holds that, where marriage is concerned, “the protection of the justified expectations of the parties is of considerable importance” and “a basic policy underlying the

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148. Matthias Lehmann, *Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT’L L. 381, 382–83 (2008).

149. *Id.* at 399.

150. *Id.* at 400.

151. *Id.* at 414.

152. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1277 (1989).

153. *Id.* at 1278.

154. Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity*, 62 N.Y.U. L. REV. 651, 681 (1987).

155. Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 56–57 (1998).

field of marriage.”<sup>156</sup> But this observation, in an interpretive comment to the *Second Restatement*, is merely aspirational, and states can and do ignore it. Based on an extensive historical survey of cases, Lynn Wardle found that in “inter-jurisdictional conflicts concerning recognition of controversial forms of domestic relations . . . protection of the strong domestic relations policy of the forum sovereign is the dominant, controlling consideration.”<sup>157</sup> Although respect for established relationships was an “influential consideration[.]” and comity was a “presumption,” in the end, “when recognition of a novel form of domestic relations would directly contradict or seriously impair or defy a strong public policy of the forum sovereign regarding domestic relations, that consideration consistently controlled the outcome.”<sup>158</sup>

Consider, too, that the Supreme Court “rarely intervenes” to protect “nonforum state interests, or the interest of nonforum litigants, that are disrupted by parochial state conflicts decisions.”<sup>159</sup> Indeed, “a state’s decision to decide an issue under its own law and not another’s is today practically immune from constitutional scrutiny.”<sup>160</sup>

Such a regime seems ill suited for adjudicating the questions of individual rights and liberty that are inherent in our modern understanding of marriage and family, because it artificially maximizes state power and control. It allows states to achieve through conflicts law a degree of hegemony over questions of marriage and family that they could not legitimately attain through substantive law that is subject to constitutional scrutiny. To deal with the phenomenon of same-sex marriage fairly and rationally, it is necessary to break out of the state interests paradigm of conflicts thinking and look instead to the liberty and privacy guarantees of the Constitution.

### III. DISTINGUISHING MARRIAGE CREATION FROM MARRIAGE RECOGNITION

It is bad to be denied the right to marry the person you choose, but it seems far worse to marry that person and then have the marriage summarily taken away from you. To understand why the Due Process Clause should protect intact marriages against interference in mini-DOMA states, it is necessary to appreciate how marriage *creation* differs from marriage *recognition* and how refusing to license a marriage differs from nullifying one. Conceptually, these distinctions are not difficult, but appreciating them is critical for breaking out of the state interests paradigm of conflicts thinking. We are accustomed to the prerogative of states to stipulate rather than

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156. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. b (1971).

157. Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1903–04 (2008).

158. *Id.* at 1904.

159. Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 271 (1996).

160. James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1510 (2008).

reason. But once we understand marriage recognition as a question of constitutional significance, it becomes clear why mini-DOMA states should be required to justify the harms they seek to inflict on extant marriages.

### A. Affirmation Versus Interference

In one of the few federal cases to consider the validity of a nonrecognition law, a district court in Florida dismissed a complaint brought by two women who had married in Massachusetts and sought recognition of the marriage in Florida.<sup>161</sup> The court rejected their claims because no controlling precedent “acknowledge[d] or establish[ed] a constitutional right to enter into a same-sex marriage.”<sup>162</sup> In coming to this conclusion, the court addressed the wrong question. The plaintiffs were not asking Florida to allow them to “enter into a same-sex marriage”—they already had one. They were simply trying to stop Florida from effectively taking their marriage away from them. Yet there was no separate constitutional principle, other than the “right to marry,” to which the court could look.

Why has marriage recognition not previously been conceptualized as a constitutional question? One theory may be that after the Supreme Court addressed interracial marriage in *Loving*—which was, remember, a recognition case, not a right-to-marry case<sup>163</sup>—states were not voiding or denying recognition to any other category of marriages (including those based on age, consanguinity, or polygamy) in a way that was visible or frequent enough to draw the attention of federal courts or the broader society. Recall that before same-sex marriage came on the scene, the public policy exception to marriage recognition had largely fallen into disuse.<sup>164</sup>

At first blush, it might seem odd to suggest that a migratory same-sex marriage should be recognized in a state that prohibits same-sex marriage for its own residents. But there is no legal or cognitive dissonance in this idea—indeed, it is the very principle behind the place of celebration rule, and as a practical matter, states have long lived with this compromise. As a New York state appellate court noted in a 2008 case that recognized a same-sex marriage that a New York resident had procured in Canada (an *evasive* marriage, it should be noted),

Under th[e] “marriage-recognition” rule, New York has recognized a marriage between an uncle and his niece “by the half blood,” common-law marriages valid under the laws of other states, a marriage valid under the

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161. See *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

162. *Id.* at 1309.

163. See *Loving v. Virginia*, 388 U.S. 1, 2–5 (1967). To recount the story briefly, in 1958, Mildred Jeter, an African-American woman, and Richard Loving, a white man, married in Washington, D.C., then returned to Virginia and established their home. Virginia not only refused to recognize interracial marriages, it criminalized them. The Lovings were prosecuted and pled guilty. The judge suspended their sentence on the condition that they leave the state. The Lovings’ legal fight to return home to Virginia took them all the way to the Supreme Court. My thanks to Mae Kuykendall for the point that *Loving* was a recognition case.

164. See *supra* notes 96–98 and accompanying text.

law of the Province of Ontario, Canada of a man and a woman both under the age of 18, and a “proxy marriage” valid in the District of Columbia, all of which would have been invalid if solemnized in New York.”<sup>165</sup>

In conflicts doctrine, “the question whether a marriage can be legally *celebrated* in a jurisdiction is entirely distinct from the question whether the marriage should be *given legal effect* in the state.”<sup>166</sup>

The key premise of my argument here is that the same distinction—creating versus recognizing—also is supportable under constitutional due process doctrine. The dignitary and practical consequences are much different between marriage *denial* and marriage *nullification*, and thus so is the balance of interests between the individual and the state.

The Due Process Clause is often regarded as a shield of negative liberty against undue state interference in the individual’s life. But Carlos Ball has suggested that the “right to marry” has a “positive component” because “[i]t is State action that creates the very institution that makes the exercise of the fundamental right to liberty in the context of marriage possible.”<sup>167</sup> A demand for a marriage license is not a demand that the state leave you alone, in the manner of a negative liberty. It is, rather, a demand for official affirmation, based on an understanding that marriage is, for many people, a “unique expressive resource.”<sup>168</sup> It is a petition that the state use its power to alter one’s legal status. In the first American decision authorizing same-sex marriage, the Massachusetts Supreme Court observed that “the government creates civil marriage . . . . In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.”<sup>169</sup> And as marriage historian Nancy Cott writes,

At the same time that any marriage represents personal love and commitment, it participates in the public order . . . . To *be* marriage, the institution requires public affirmation. It requires public knowledge—at least some publicity beyond the couple themselves; that is why witnesses are required for the ceremony and why wedding bells ring. More definitively, legal marriage requires state sanction, in the license and the ceremony.<sup>170</sup>

Marriage’s public dimension explains in part why gay and lesbian advocates are fighting to expand the institution and why traditionalists are fighting to confine its meaning: “Both traditionalists and progressives are

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165. *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740, 742 (App. Div. 2008) (citations omitted).

166. Joanna L. Grossman, *New York’s Highest Court Upholds Benefits for Same-Sex Spouses in Narrow Ruling*, FINDLAW (Nov. 24, 2009), <http://writ.news.findlaw.com/grossman/20091124.html> (emphasis added).

167. Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1187, 1206 (2004).

168. David B. Cruz, “*Just Don’t Call It Marriage*”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 928–929 (2001).

169. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

170. COTT, *supra* note 39, at 1–2.

motivated by the symbolic legitimacy and status offered by civil marriage.”<sup>171</sup>

The constitutional “right to marry” has always been murky. Although the Supreme Court has said the right is “fundamental,” it has also hedged its position by giving a wide berth to state interests, explaining that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”<sup>172</sup> But the Court has not explained what makes a marriage-entry regulation “reasonable,” or how we can tell when it “significantly interfere[s] with” the ability to enter marriage. Moreover, in the small number of marriages cases they have decided, the Justices “have drawn on both due process and equal protection rationales, sometimes alternating between them, sometimes relying on both, and sometimes explicitly invoking neither,” with the result that “both the rationale for [the fundamental right to marry] and its structure have remained unclear.”<sup>173</sup>

Cass Sunstein goes so far as to argue that the right to marry “ought not to be protected as a matter of substantive due process,” and that “[i]f a state abolished the official institution of marriage, it would be acting constitutionally,” because “[t]he state is under no obligation to confer either the expressive or the material benefits of marriage.”<sup>174</sup> At the same time, he acknowledges that “[s]ome of the associational benefits now connected with marriage could, and probably must, be respected even if marriage did not exist.”<sup>175</sup> True fundamental rights, Sunstein writes, “are generally rights to be free from government intrusion”; unlike marriage creation, “they do not require affirmative provision by the state.”<sup>176</sup> Rather, they simply “require[] governmental noninterference.”<sup>177</sup> For this reason, it is a misnomer to equate the right to marry with the substantive due process right to privacy. Doing so reflects what Richard Posner calls “[t]he curious appropriation of the word privacy to describe what is not privacy in the ordinary sense but rather freedom.”<sup>178</sup>

By contrast, a right of marriage recognition is much closer to a negative liberty. At the most basic level, it is a demand that a state not interfere with an intact legal relationship among members of a nuclear family. The contingent and uncertain right to marry stands in contrast to the Supreme Court’s decisions that protect privacy within the context of *extant* marital, family, and intimate relationships. The Court does not lightly declare entire areas of human endeavor to be “sanctuar[ies] from unjustified interference by the

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171. Marc R. Poirier, *The Cultural Property Claim within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 359 (2008).

172. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

173. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right To Marry*, 158 U. PA. L. REV. 1375, 1386–87 (2010).

174. Cass R. Sunstein, *The Right To Marry*, 26 CARDOZO L. REV. 2081, 2118 (2005).

175. *Id.*

176. *Id.* at 2094.

177. *Id.*

178. RICHARD A. POSNER, *SEX AND REASON* 335 (1992).

State”<sup>179</sup> or “realm[s] of personal liberty which the government may not enter.”<sup>180</sup> But it has placed extant marital, family, and intimate relationships in this space. Even Justice Scalia has said that “sanctity would not be too strong a term” for “relationships that develop within the unitary family.”<sup>181</sup> In the line of due process decisions that culminated in *Lawrence*, the Court almost appears to have recognized, at least rhetorically, what libertarian theorist Randy Barnett has called a “presumption of liberty”<sup>182</sup>—a paradigm that “places the burden on the government to establish the necessity and propriety of any infringement on individual freedom,”<sup>183</sup> and which virtually never settles for mere rational basis scrutiny.

The right-to-marry cases concern access to a state-created institution, and the Court has signaled deference toward states to prescribe the prerequisites for marriage. By contrast, the family and relationship privacy cases protect a right to be left alone: to keep the state out of one’s marital relationship (*Griswold*), parenting decisions (*Meyer*, *Pierce*), and reproductive and sexual choices (*Griswold*, *Eisenstadt*, *Roe*, *Lawrence*); to maintain relationships whose “meaning” the government may not “define” (*Lawrence*); and to live with one’s own family members and be free from the government’s attempts to define and coercively enforce the makeup of a permissible family (*Stanley*, *Moore*). In *Zablocki*, Justice Powell expressed the view that an existing marriage carried a higher liberty interest than did the right to enter marriage. In his concurring opinion, Justice Powell said:

Although the cases cited in the [majority opinion] indicate that there is a sphere of privacy or autonomy surrounding an *existing* marital relationship into which the State may not lightly intrude, they do not necessarily suggest that the same barrier of justification blocks regulation of the conditions of *entry into* . . . the marital bond.<sup>184</sup>

The analogy of marriage recognition to negative liberty is imperfect, to be sure. For one thing, the Court’s family privacy jurisprudence is “fragmented” and “fail[s] to identify and adhere consistently to a single standard

179. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

180. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

181. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion).

182. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

183. *Id.* at 259–60; cf. Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 21 (2003) (“If the approach the Court took in the case is followed in other cases in the future, we have in *Lawrence* nothing short of a constitutional revolution, with implications reaching far beyond the ‘personal liberty’ at issue here.”); Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court’s Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 690 (2005) (arguing that “the Court’s individual rights jurisprudence has moved away in recent years from recognizing the beliefs and practices of the community as sources of normativity and value and as a legitimate basis for legislation” and that the Court “seems inclined . . . to constitutionalize much of John Stuart Mill’s libertarianism”).

184. *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring) (emphasis added).

of constitutional review.”<sup>185</sup> For another, if one state recognizes another state’s marriage, it must also provide the normal state-created incidents of marriage, a mix of legal privileges and responsibilities that give some component of affirmative recognition to the marriage. But as I discuss in Section IV.B.3, the primary purpose served by most of these incidents is to safeguard the integrity, privacy, and longevity of marriages. Functionally, they express the state’s support for marriage, but they rest on neutral principles of promoting commitment, responsibility, and stability in family relationships; they only favor heterosexual marriage if the state chooses to restrict them to heterosexuals. When everything else in a state’s marriage policy points toward the goal of preserving and protecting the rights of married individuals so that their marriages succeed, laws specifically aimed at voiding or denying recognition to intact marriages without cause or due process appear all the more perverse and unacceptable.<sup>186</sup>

### B. Forcing the State to Justify Its Harm

When a state withholds a marriage license, it circumscribes the individual’s life choices; it classifies the individual in a way that denies the possibility of access to social recognition and public benefits. But this is different from the harm a state inflicts when it voids or denies recognition to an extant marriage. As Koppelman notes, “A rule that same-sex marriages are void the moment one of the parties changes her domicile would have absurd results.”<sup>187</sup> If two people who were once married are suddenly rendered legal strangers to one another, property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil. One spouse might be prevented from making emergency medical decisions for the other. Some states might not honor contracts benefiting a same-sex spouse, and same-sex couples might be “subject to having the[ir] children snatched from them and placed in foster care.”<sup>188</sup> Should the couple choose to exit the relationship someday, access to divorce may not be possible.<sup>189</sup> Moreover, “[a]s a legal stranger, your

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185. Meyer, *supra* note 69, at 532.

186. See Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California’s Existing Same-Sex Marriages*, 60 HASTINGS L.J. 1063, 1098 (2009) (arguing that “marital law is structured to reinforce” the expectation that a marriage should endure, and “[i]t would, therefore, be strange indeed . . . for the state to suddenly become a unilateral force mandating retroactive voiding of marriages that were unquestionably valid at their inception”).

187. Koppelman, *supra* note 133, at 2155.

188. Stanley E. Cox, *Nine Questions About Same-Sex Marriage Conflicts*, 40 NEW ENG. L. REV. 361, 374 (2006).

189. See Joanna L. Grossman, *No Gay Divorcees in Texas: An Appellate Court Refuses to Dissolve a Same-Sex Marriage*, FindLaw (Sept. 13, 2010), <http://writ.corporate.findlaw.com/grossman/20100913.html> (“Can a couple that marries in one jurisdiction get divorced in another? . . . [F]or same-sex couples, the answer is no better than ‘Maybe’ (and in many cases, it is clearly ‘No’) due to the patchwork of inconsistent state laws regarding same-sex marriage.”).

partner stands behind children, parents, siblings, grandparents, aunts and uncles, cousins, and even the state in terms of priority and legal standing,” and “this absence of relationship can have significant bearing in cases of relationship dissolution, child custody, second parent adoption, inheritance, and health care decision-making.”<sup>190</sup>

Conflicts doctrine, having no enforcement mechanisms, is impotent to address all these harms.<sup>191</sup> But framing marriage recognition as a matter of constitutional due process brings individual interests into the equation and forces the state to justify the harm it seeks to impose. In a substantive due process case, the core of the analysis is assessing whether the state’s interest in maintaining a liberty-infringing policy is important and necessary enough to justify the specific harm that the plaintiff is forced to suffer.

To be sure, my view of marriage recognition as something that requires balancing state and individual interests swims against the tide of conventional wisdom, which simply accepts that a state has the authority to convert a married couple to the status of legal strangers. Mark Rosen argues that “the prospect that two states may disagree about what constitutes a valid marriage is not terribly daunting.”<sup>192</sup> Even “[i]f it seems odd that two persons may be married in the eyes of one state but not others,” that problem merely “reflects the fact that different political communities feel differently about what constitutes a valid marriage,” something that should be respected as a matter of “federalism’s commitments to political diversity.”<sup>193</sup> Similarly, Lynn Hogue says that “[p]ublic policy is so integral a part of the decision of a state as to who can be married, to whom and under what circumstances, that no state can dictate the terms of that relationship for another.”<sup>194</sup>

But these positions are sound only if we assume that the law should view marriage recognition solely in terms of a clash of state interests, rather than a clash between the state and the individual. The relevant question is not whether a state has an interest in its definition of marriage in the abstract. As to persons who seek new marriages under its laws, it surely does have such an interest. But for marriage *recognition*, the relevant question is whether the state has a sufficiently important and necessary interest in its marriage policy to justify the harms it proposes to inflict on *already-married* couples. “When a state favors its interests over individuals’ interests in

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190. Nancy J. Knauer, *Same-Sex Marriage and Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 421, 439 (2008) (footnote omitted).

191. See *supra* notes 145–158 and accompanying text.

192. Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 997 (2006).

193. *Id.*

194. L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”*: *How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 37 (1998).



choice of law, it is using the individual as a means to an end.”<sup>195</sup> When states behave in this way, constitutional scrutiny is required.

#### IV. MARRIAGE RECOGNITION UNDER THE DUE PROCESS CLAUSE

To this point, I have explained that marriage and family are protected by well-established constitutional principles, and that nonrecognition laws represent an intrusion by the state into extant family relationships. I have also explained that reliance on conflicts principles cannot provide a rational and expeditious solution to the problem of migratory same-sex marriages. By breaking out of the state interests paradigm, and by acknowledging the difference between marriage creation and marriage recognition, we can appreciate the harm that nonrecognition laws inflict and why states should be required to justify that harm as necessary to significantly advancing an important interest.

In this Part, I discuss four principles of constitutional due process that support a right of marriage recognition. I then consider the interests that a state might assert in opposing this right for same-sex couples. But first, I explain the level of scrutiny that is appropriate for this analysis.

##### A. *The Appropriate Level of Scrutiny*

Marriage nonrecognition laws should be scrutinized under the Due Process Clause so that the interests of a state in its anti-same-sex marriage policy are weighed against the interests of the marital parties in the continued existence of their marriage. A flexible, intermediate level of scrutiny, requiring the state to advance important interests and show that marriage nullification is necessary to significantly further those interests, is the appropriate judicial test.

In its marriage and family privacy cases other than *Loving* (where race discrimination was the overriding concern), the Supreme Court, David Meyer argues, has applied neither strict scrutiny nor mere rational basis scrutiny, but instead a more “flexible” burden of justification for the government.<sup>196</sup> For example, in both *Moore* (a family case) and *Zablocki* (a marriage case), he says,

[T]he Court departed from the usual language of “compelling” interests and “narrow tailoring” in describing the governing review, substituting ambiguous verbiage in its place. In *Moore*, for example, having found a burden on Mrs. Moore’s fundamental right of family kinship, the Court held only that it would then “examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.” Perhaps these formulations meant to imply

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195. Fruehwald, *supra* note 155, at 60; see also Brilmayer, *supra* note 152, at 1291 (“The problem with consequentialist approaches to choice of law is that the individual is treated merely as a means to an end.”).

196. See David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 915 (2006).

strict scrutiny, but the Court's pointed ambiguity suggested to some readers a commitment to an intermediate standard of review.<sup>197</sup>

Moreover, in *Lawrence*, "the Court's failure to employ any clearly recognizable standard of scrutiny . . . has led several scholars to detect a more general breakdown of the established 'tiers' of scrutiny even beyond the context of family privacy."<sup>198</sup> And Randy Barnett writes that in *Lawrence*, the Court broke "free at last of the post-New Deal constitutional tension between the 'presumption of constitutionality,' on one hand, and 'fundamental rights,' on the other."<sup>199</sup> The majority "did not begin by assuming the statute was constitutional. But neither did they call the liberty at issue 'fundamental.'"<sup>200</sup> Rather, "the Court took the much simpler tack of requiring the state to justify its statute, whatever the status of the right at issue."<sup>201</sup>

In a recent case dealing with an individual service member's substantive due process challenge to the military's "Don't Ask, Don't Tell" policy, the Ninth Circuit carefully analyzed *Lawrence* and similarly concluded that the "Court's rationale for its holding—the inquiry analysis that it was applying—is inconsistent with rational basis review."<sup>202</sup> The appellate court also took note of a post-*Lawrence* substantive due process case, *Sell v. United States*,<sup>203</sup> which involved forcible administration of antipsychotic drugs to a mentally ill criminal defendant. In *Sell*, the Supreme Court recognized a "significant constitutionally protected liberty interest" (though not a fundamental right) in "avoiding the unwanted administration of antipsychotic drugs."<sup>204</sup> The Court held that such intrusion on personal interests by the government was permissible only where it was "necessary significantly to further important governmental trial-related interests."<sup>205</sup> In other words, a mere legitimate interest would not suffice. Reading *Sell* and *Lawrence* together, the Ninth Circuit concluded that intermediate scrutiny was appropriate where "the government attempts to intrude upon the personal and private lives of homosexuals."<sup>206</sup> Specifically, the appellate court held that "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest."<sup>207</sup> This standard informs my discussion in the sections that follow.

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197. *Id.*

198. *Id.* at 917.

199. Barnett, *supra* note 183, at 21.

200. *Id.*

201. *Id.*

202. Witt v. Dep't of the Air Force, 527 F.3d 806, 817 (9th Cir. 2008).

203. 539 U.S. 166 (2003).

204. *Sell*, 539 U.S. at 178 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)) (internal quotation marks omitted).

205. *Id.* at 179.

206. Witt, 527 F.3d at 819.

207. *Id.*

In suggesting a right of marriage recognition, I am not making an argument under Equal Protection Clause doctrine, and thus my argument does not depend on finding gays and lesbians to be a suspect class. Nonetheless, there is some element of equal protection thinking in the analysis. For example, assume that two married couples—Evan and John, and Harry and Louise—migrate to a mini-DOMA state. The state will, of course, recognize Harry and Louise’s marriage without anyone really thinking about it. As for Evan and John, I am not arguing that their marriage must be recognized because they were similarly situated to Harry and Louise in their capacity to enter marriage. That assertion would simply collapse into a right-to-marry argument under the Equal Protection Clause. Rather, what makes the two couples similarly situated is their status as parties to an extant, valid marriage. A right of marriage recognition would take hold only after a couple had been validly married, and it would place a shield around that status, forcing a state to provide important justifications before voiding the marriage or denying it recognition.

One of the criticisms of recognizing liberty interests under the Due Process Clause is that those interests—for example, the right to be free of sodomy laws or certain abortion restrictions—typically are recognized in the teeth of positive law. But the right of marriage recognition simply prevents discrimination in the allocation of marriage benefits and duties that are already created by positive law.<sup>208</sup>

The use of due process to prevent states from improperly excluding same-sex marriages from the longstanding place of celebration rule reflects how, as Cass Sunstein writes, due process

has been interpreted largely . . . to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.<sup>209</sup>

Under due process analysis, a “highly relevant” consideration is “whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack.”<sup>210</sup> In a similar vein, Kenneth Karst argues that although we typically think of “group subordination” as a problem addressed by the Equal Protection Clause, the “antisubordination values” of equal citizenship “have contributed to individual liberties” and that “concerns about group subordination have profoundly influenced the doctrinal growth of substantive due process.”<sup>211</sup> In the Fourteenth Amendment, he concludes, “‘liberty’ means equal liberty.”<sup>212</sup> And the

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208. My thanks to Will Baude for this point.

209. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

210. *Id.*

211. Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102 (2007).

212. *Id.* at 133.

Supreme Court acknowledged a similar principle in *Lawrence*, observing that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects.”<sup>213</sup> In a recent article, Kenji Yoshino argues that the Court has been “shut[ting] doors in its equality jurisprudence in the name of pluralism anxiety,” but has at the same time “opened doors in its liberty jurisprudence to compensate.”<sup>214</sup>

If marriage recognition is a significant liberty interest, that suggests it should be a neutral principle applicable to all marriages, not a right synthesized exclusively for the benefit of gays and lesbians. I agree. If this is so, however, might the same rule force states to recognize incestuous, polygamous, or other “taboo” marriages? Such outcomes are not a necessary consequence of the rule, and we should not be detained by such red herrings. First, as I demonstrated in Section II.B.2, in contemporary practice such marriages are very rarely an issue, because no state licenses polygamy or truly “incestuous” marriages,<sup>215</sup> while seven jurisdictions currently license same-sex marriages. More importantly, the flexible, intermediate form of scrutiny I have suggested leaves ample room to consider state interests that are distinctively implicated by polygamy or incest. For one thing, the constitutionality of criminal bans on polygamy and incest remain securely in place. (Remember that no state authorized same-sex marriage before the Court struck down sodomy laws in 2003.) Polygamy also has been associated with “abusive impact on children,”<sup>216</sup> while same-sex marriages have not. Other state interests furthered by restrictions on polygamy may include “[m]aintaining the binary nature of marriage” and “equality of the sexes.”<sup>217</sup> And of course, incest involves concerns over coercion and voluntary consent. In short, it is entirely plausible that a state could assert important interests that were significantly advanced by continuing to deny recognition to such marriages. A right of marriage recognition would simply put states to their proof, which is not an unreasonable demand where something as important as a marriage is at stake.

And so we should deal with the problem that is actually in front of us. The constitutional protections the Court has already extended to gays and lesbians and their relationships, most notably in *Lawrence*, along with the growing public support for same-sex marriage and the empirical reality that tens of thousands of such marriages have already been performed, all sharply distinguish same-sex marriage in the contemporary United States from any other “taboo” unions. Accordingly, my discussion in the next two Sections of

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213. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

214. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 750 (2011).

215. See *supra* notes 104–112 and accompanying text.

216. Amy Fry, Comment, *Polygamy in America: How the Varying Legal Standards Fail to Protect Mothers and Children from Its Abuses*, 54 ST. LOUIS U. L.J. 967, 969 (2010).

217. Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065, 1068 (2006).

this Part reflects the specific context of extant same-sex marriages and the individual and state interests they implicate.

*B. Due Process Principles Supporting a Right of Marriage Recognition*

*1. Reasonable Expectations and Reliance*

As the place of celebration rule recognizes, marriage implicates important individual interests based on reliance and reasonable expectations. When two individuals marry, they make long-term plans for their lives, finances, property, and children. As one state high court observed, “In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.”<sup>218</sup> Marriage nullification laws “frustrate[] rational planning” because “[t]here are significant costs when actors . . . are forced to make decisions without knowing what law governs their actions.”<sup>219</sup> As one prominent conflicts scholar explains, “Couples moving from state to state usually rightly anticipate that their status does not change. Marriages, after all, are not like fishing licenses where one needs a new one in each new state and with each new season.”<sup>220</sup> And as a leading treatise observes, “Human mobility ought not to jeopardize the reasonable expectations of those relying on an assumed family pattern.”<sup>221</sup> A person seeking to get married, of course, has no such reliance and expectation interests; such interests arise only once a marriage has been formed. Such reliance and expectation interests are perhaps the most obvious way that an *existing* marriage differs from a *potential* marriage.

One of the purposes of the Due Process Clause traditionally has been to protect a party’s reasonable expectations when they are endangered by government action,<sup>222</sup> and so it is appropriate to look to due process to protect extant marital relationships. A right of marriage recognition also is consistent with an understanding of due process as grounded in principles of “reasonable societal reliance.”<sup>223</sup> Such an approach “look[s] to the existing

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218. *In re Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974); see also Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 856 (1988) (“[T]he law of domestic relations—like the law governing many other consensual relationships—has always protected the ‘reliance interest,’ that is, the parties’ change of position in reliance on the joint enterprise.”).

219. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 12–13 (1991).

220. Borchers, *supra* note 75, at 354.

221. SCOTES ET AL., *supra* note 11, at 560.

222. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 336 (1990) (explaining that parties’ “reasonable expectations” are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, at least when the expectations are “so widely shared as to be uncontroversial”).

223. Brandon R. Johnson, Note, “Emerging Awareness” After the Emergence of Roberts: Reasonable Societal Reliance in Substantive Due Process Inquiry, 71 BROOK. L. REV.

rules and understanding to determine whether the plaintiff could objectively rely on continuing the questioned practice,”<sup>224</sup> based on practices in which “citizens have developed a real and rational trust.”<sup>225</sup> A right of marriage recognition, which simply tracks the familiar place of celebration rule and the ordinary expectations of married couples, is consistent with such an approach.

A couple’s expectations and reliance interests take concrete form when it comes to the property interests—bank accounts, real estate, inheritance rights—that are intertwined with marriage. As the California Supreme Court explained in a decision upholding the validity of same-sex marriages that had occurred before voters approved a constitutional mini-DOMA, married couples “acquire[] vested property rights as lawfully married spouses with respect to a wide range of subjects, including, among many others, employment benefits, interests in real property, and inheritances.”<sup>226</sup> Extinguishing a marriage without divorce or due process could wipe out these property interests if they are not separately secured by contracts or wills.

Going a step further, it does not seem far-fetched to suggest that a marriage *itself* could be regarded as a form of property interest that cannot be taken away without due process.<sup>227</sup> After all, the Supreme Court’s procedural due process jurisprudence has given constitutional “property interest” protection to things like welfare benefits<sup>228</sup> and tenured government employment.<sup>229</sup> The basic principle is that once state law creates a “legitimate claim of entitlement” to something, the state cannot just unilaterally take that thing away; it must do so under fair procedures.<sup>230</sup> The problem with

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1587, 1591 (2006) (describing reasonable societal reliance as “citizens hav[ing] developed a real and rational trust in the protected nature” of certain practices (emphasis omitted)).

224. *Id.* at 1596 (emphasis omitted); *see also* Shreve, *supra* note 159, at 289 (“When we turn to the numerous conflicts policies that are capable of a second life under the Constitution, the policy that chosen law not disturb the reasonable expectations of a party seems a natural choice.”)

225. Johnson, *supra* note 223, at 1591 (emphasis omitted).

226. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009); *see also* *Callahan v. Callahan*, 15 S.E. 727, 731 (S.C. 1892) (“[W]ithout entering now into the argument whether marriage is only a political and social *status*, we cannot doubt that, whatever else it may be, under our law, it is as well ‘a civil contract,’ and confers valuable vested rights.”). Most state courts have rejected the idea that spouses have a vested right in the status of marriage itself, though many of these cases date back to a time when the authority of the state over marriage was considered absolute. *See, e.g.,* *Noel v. Ewing*, 9 Ind. 37, 50 (1857) (“[A]s between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate.”).

227. Alternatively, one commentator suggests that an extant marriage should be regarded as private property protected by the Takings Clause. Goutam U. Jois, Note, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 HARV. C.R.-C.L. L. REV. 509 (2006).

228. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

229. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–77 (1972).

230. *Id.* at 577.

this argument as applied to marriage recognition is that the Court has not extended this doctrine to property interests that are acquired in one state and later taken to another state.<sup>231</sup> Thus, there is no authority that the Constitution will step in if State B confiscates as illegal contraband the fireworks that were perfectly legal for you to buy in State A. On the other hand, marriage—a relationship the Supreme Court has described as “intimate to the degree of being sacred”<sup>232</sup>—seems entitled to more regard than contraband personal property. At any rate, the better path is to regard an extant marriage as a liberty interest, rather than property, because Due Process Clause liberty is the framework for the protection the Court has given to existing family and intimate relationships.

The argument might be made that same-sex couples do not reasonably have the same expectations concerning their marriages as heterosexual couples; most states still prohibit same-sex marriage, the argument might go, and so “no same-sex couple can plausibly plead ‘surprise,’ in light of the flurry of anti-recognition statutes.”<sup>233</sup> Of course, there is no agreed-upon legal definition of “reasonable expectations,” and arguments about them can quickly become circular. Larry Kramer observes that “[s]tatements about the parties’ reasonable expectations mask normative judgments reflecting what a court believes the parties ought to expect.”<sup>234</sup> But there are good reasons why migratory same-sex couples who did not evade the law of their domicile should not be excluded from a reasonable expectation in the durability of their marriages.

First, most people are not conflicts scholars. Most married couples move freely across state borders without giving it a second thought, and so even if many same-sex couples are aware that they cannot get married in most states, it is not necessarily obvious they should be on notice that a move to a new state could effectively make their marriage vanish. The idea that an extant legal family relationship can be nullified by operation of law is foreign to modern American experience and constitutional jurisprudence.

Second, the legal landscape for same-sex marriage in the United States is complex and rapidly changing. A mere seven years ago, same-sex marriage was available in one jurisdiction, Massachusetts; today it is available in seven. Same-sex marriage was legal for a while in both California and Maine, but now it is not; California still offers the statutory benefits and protections of marriage, but calls it domestic partnership.<sup>235</sup> Vermont and Connecticut once

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231. That is, unless one looks all the way back to *Dred Scott*, but that seems a dubious precedent to rely on. See *Dred Scott v. Sandford*, 60 U.S. 393, 450–51 (1857) (discussing constitutional protection for the right to transport property, in the form of a slave, from one state to another).

232. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

233. *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2051 (2003).

234. Kramer, *supra* note 222, at 336.

235. NAT’L CONF. OF STATE LEGISLATURES, *supra* note 1.

offered only civil unions to same-sex couples; now they offer marriage.<sup>236</sup> Maryland will recognize same-sex marriages even though it will not perform them, a stance that New York also maintained until its legislature voted to authorize same-sex marriages in 2011.<sup>237</sup> Meanwhile, at any given moment there are lawsuits and legislative initiatives pending in various states that could redraw the map yet again.<sup>238</sup> Under these conditions, it is neither practical nor fair to subject same-sex couples to a quantum of confusion and uncertainty that other couples would not tolerate.

In short, I am arguing that the reliance and expectation interests in a marriage should be evaluated normatively and objectively. After all, equal-marriage states have not created a separate new category in their laws for same-sex unions. A marriage is simply a marriage, and all marriages should exist on equal footing. Moreover, none of the neutral, utilitarian policies behind the longstanding place of celebration rule—such as assuring stability and predictability in legal relationships, allowing free movement around the country, and preventing casual evasion of marital responsibilities—apply with any less force to same-sex marriages. Accordingly, same-sex couples should be entitled to expect nothing less than other couples. The alternative view—that a couple’s reliance interests and expectations in their marriage should vary from state to state—is unsound, because it forces the couple to waive their marital rights as the price of taking a new job, pursuing education, caring for family, or engaging in any of the other routine life activities and responsibilities that lead people to establish domicile in a new state.<sup>239</sup>

## 2. Marital and Family Privacy

Under the right of marital privacy provided by *Griswold*, a state may not invade any married couple’s relationship by snooping in their bedroom or policing their sexual intimacy. But that same state can, based on nothing more than the disapproval of a governing majority, declare the marriage of a same-sex couple to be a legal nullity. Intuitively—that is, so long as we are no longer trapped in the state interests paradigm of conflicts thinking—this makes no sense. Is it really far-fetched to suggest that, when a state purports

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236. *Id.*

237. *Id.*

238. As this Article was going to press, legislators in Maryland and the State of Washington had approved same-sex marriage, but implementation was on hold pending possible challenges by voter initiative. Cray, *supra* note 1. At the same time, California’s ban on same-sex marriage was tied up in protracted federal litigation. Adam Nagourney, *Court Strikes Down Ban on Gay Marriage in California*, N.Y. TIMES (Feb. 7, 2012), at A1 (discussing the intent of the litigants to bring the case to the Supreme Court).

239. Other commentators have agreed that migratory same-sex couples are entitled to the benefit of a reasonable expectations rule concerning their marriages. For example, Linda Silberman writes that “[b]ecause of the reliance and expectation interests of the parties that their marriage was valid under the law of the state of ‘domicile at the time of marriage,’ that rule would be the preferable one to govern the incidents of marriage [in a new state].” Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 203 (1996).



to void or deny recognition to an existing marriage, it has invaded marital and family privacy? The answer should be no.

To be sure, states have always had the power to regulate existing marriages. But “regulation” falls short of prescribing a law that purports to nullify a marriage without cause or due process. States do not surveil or evaluate existing marriages to assure that they are continuing to advance the state’s policy goals, and most couples do not expect to prove up their marriages and submit them for revalidation when they move from one state to another. In this sense, we expect same-sex couples to put up with a sort of legal fiction about state power over extant marriages that no one else would. For most people, marriage regulation is “benevolent, lend[ing] symbolic and material support to private family commitments.”<sup>240</sup> The “coercive” side of marriage regulation, which “marshals the state’s authority to control and regulate the most personal aspects of our lives,” is “rarely felt” by the “political majority.”<sup>241</sup> American law has moved “toward withdrawal by the state from much that it has done to regulate marriage,” such that “the legal consequences of marriage are becoming harder to distinguish from those of other comparable intimate associations.”<sup>242</sup> The point of most regulation is to reinforce the longevity and durability of the union and to protect the privacy and integrity of the married couple.<sup>243</sup> With the exception of prohibitions on violence within families and requirements of some minimum level of spousal support, “the state recognizes the privacy of the intact marital relationship.”<sup>244</sup> This fact makes it all the more anomalous for a state to claim the power to void or deny recognition to one particular category of marriages.

Marriage nonrecognition laws force us to think seriously about what it means to declare the existence, as the Court has done numerous times, of a “private realm of family life which the state cannot enter.”<sup>245</sup> For example, in *Moore*,<sup>246</sup> one of the most generative family privacy and autonomy cases,<sup>247</sup> the Court struck down a city zoning ordinance that would have prevented a grandmother from living under the same roof with her grandchildren. Is

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240. Ann Laquer Estin, *Marriage and Belonging*, 100 MICH. L. REV. 1690, 1707 (2002) (reviewing NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000)).

241. *Id.*

242. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 648–49 (1980).

243. See Weithorn, *supra* note 186, at 1098.

244. Hamilton, *supra* note 62, at 323 n.54.

245. *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

246. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion).

247. See Pala Hersey, *Moore v. City of East Cleveland: The Supreme Court’s Fractured Paean to the Extended Family*, 14 J. CONTEMP. LEGAL ISSUES 57, 61–62 (2004) (“[*Moore*] has figured prominently as a precedent in several Supreme Court decisions dealing with ‘family privacy’ arguments on behalf of nontraditional relationships. More broadly, the *Moore* plurality’s position has played a prominent role in some of the Court’s most important decisions on Substantive Due Process . . .” (footnote omitted)).

that a greater or lesser intrusion than nullifying a marriage? In *Moore*, the government attempted to disrupt the cohabitation of blood relatives. In a mini-DOMA state, the government allows a same-sex couple to cohabit but renders them legal strangers for all other purposes. In *Moore*, the plurality opinion explained that when the government “undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate,”<sup>248</sup> and that, while the family is not beyond regulation, “when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”<sup>249</sup> But voiding or declining to recognize a marriage is also a form of “intrusive regulation of the family,” because converting a married couple into strangers in the eyes of the law inevitably disrupts lives and relationships in myriad ways. Isn’t the enjoyment of an existing marriage a form of “family living arrangement,” and if so, why shouldn’t it be protected under the same due process principles that were underscored so powerfully in *Moore*?

As a matter of both procedural and substantive due process, a state cannot terminate a parent’s legal rights over her child without a hearing, at which it must present clear and convincing evidence of unfitness.<sup>250</sup> But for all practical purposes, when a state voids or declines to recognize a marriage, it is terminating the spouses’ legal rights vis-à-vis each other. A parent and child form one legal relationship within the nuclear family; two spouses form another. If the state cannot lightly sever one, why should it be able to lightly sever the other? After all, the Court has never suggested that the parent-child relationship is more important or more fundamental than marriage. Indeed, since the foundational cases of *Meyer*<sup>251</sup> and *Pierce*,<sup>252</sup> the family privacy cases have tended to discuss them together, emphasizing that substantive due process protects “relationships that develop within the unitary family.”<sup>253</sup> These cases have recognized that “[t]raditional associations like marriage or the family created zones of privacy . . . because State action there was deemed to *threaten* the flourishing of a commonly held morality, not to sustain and uphold it.”<sup>254</sup>

David Meyer argues that “withholding formal recognition from some relationships, while giving preference to others in a broader regulatory scheme, can itself be a form of damaging intervention in disfavored family

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248. *Moore*, 431 U.S. at 499.

249. *Id.*

250. *Santosky v. Kramer*, 455 U.S. 745, 753, 769 (1982); *see also infra* text accompanying notes 293–296.

251. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

252. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

253. *E.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion).

254. *Delahunty & Perez*, *supra* note 183, at 687.

relationships.”<sup>255</sup> The “unique qualities of marriage . . . [as] demonstrated in a growing body of social science research, mean that state limitations on access can in fact impair the dynamics of excluded family relationships.”<sup>256</sup> For example, “legal marriage may reconstitute personal identity, leading spouses to define themselves in part by their commitment to others.”<sup>257</sup> One of the many reasons marriage matters to spouses “is that society regards marriage as the ultimate marker of commitment and permanence.”<sup>258</sup> By contrast,

[c]ouples who are excluded from marriage . . . must construct their relationship not only without the benefits conferred by marriage, but also in the face of state-backed norms denigrating the seriousness and substantiality of all non-marital relationships. In this sense, the state’s exclusion of some persons from marriage, consigning them to occupy indefinitely the informal status of cohabitation, may not simply deny them a positive benefit, but do them a distinct harm.<sup>259</sup>

Thus, “[t]he state’s relegation of some relationships to a disfavored and disadvantaged legal status might rightly be understood as actively destabilizing those relationships, triggering constitutional scrutiny even under conventional conceptions of family privacy as a negative right.”<sup>260</sup>

The fact that an extant marriage involves two members of the same sex does not make the privacy interest less compelling. The privacy of an existing marriage is a neutral principle, because it has nothing to do with favoring certain ideas about gender roles or heteronormativity. If a state seeks to deny same-sex couples the same expectations of privacy and autonomy that it grants to other couples, it is simply making a normative judgment that same-sex marriages are inferior. “What makes a family relationship or personal decision worthy of heightened constitutional protection,” Meyer argues, “is not the particular stakes for the individual, but whether society traditionally has regarded the particular relationship or choice as off-limits to governmental interference.”<sup>261</sup> Here, that “relationship or choice” is properly understood as *marriage*, not any one form of marriage. As I explain further in Section IV.B.2, the state’s expressive or channeling interests in marriage—that is, its interests in reserving marriage creation for heterosexual couples—do not properly operate on an existing marriage.

*Lawrence v. Texas* becomes relevant here not because the issue of marriage was presented in *Lawrence* (it was not), but because *Lawrence* brought same-sex relationships under the protection of the Due Process Clause. Same-sex relationships are now situated within the same “realm of

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255. Meyer, *supra* note 196, at 898. Although he refers to “recognition,” Meyer in this article is actually discussing a right of same-sex couples to marry in the first instance.

256. *Id.*

257. *Id.* at 909.

258. *Id.* at 910.

259. *Id.*

260. *Id.* at 919.

261. Meyer, *supra* note 69, at 535–36.

personal liberty which the government may not enter” that was already anchored by the Court’s marriage and family privacy decisions.<sup>262</sup> *Lawrence* instructs that, where same-sex couples are concerned, a state may not “seek to control a personal relationship,” “define the meaning of the relationship,” or “set its boundaries absent injury to a person or abuse of an institution the law protects.”<sup>263</sup> If a mini-DOMA state does anything when it purports to void or deny recognition to an existing marriage, it certainly seeks to control that relationship, set its boundaries, and define its meaning. *Lawrence* teaches that the *reason* states may not criminalize sodomy is that “sodomy is understood to be essential to a personal relationship that has constitutional value.”<sup>264</sup> Indeed, the “[t]hemes of respect and stigma [that] are at the moral center of the *Lawrence* opinion . . . are entirely new to substantive due process doctrine.”<sup>265</sup> “What is truly ‘fundamental’ . . . *Lawrence* tells us, is not the set of specific acts that have been found to merit constitutional protection, but rather the relationships and self-governing commitments out of which those acts arise . . . .”<sup>266</sup> *Lawrence* demonstrates family privacy doctrine’s continuing ability to adapt to new questions and problems. It teaches that “while history is a crucial (perhaps *the* crucial) guide to the contours of *what* rights are implicitly protected by due process, it is not a guide to *who* gets to exercise those rights.”<sup>267</sup>

“[T]he fundament of the right to privacy,” Jeb Rubinfeld argues, “is not to be found in the supposed fundamentality of what the law proscribes. It is to be found in what the law imposes.”<sup>268</sup> Viewed from this standpoint, “[t]he distinguishing feature of the laws struck down by the privacy cases has been their profound capacity to direct and to occupy individuals’ lives through their affirmative consequences.”<sup>269</sup> Just as “the real force of anti-homosexual laws” like the sodomy statutes struck down in *Lawrence* was “that they enlist and redirect physical and emotional desires that we do not expect people to suppress,”<sup>270</sup> the real force of antimarriage recognition laws is that they enlist and redirect emotional commitments, legal rights, and personal identities that we do not expect people to merely surrender.

Marriage is among the “undertakings that go on for years, define roles, direct activities, operate on or even create intense emotional relations, enlist the

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262. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

263. *Id.* at 567.

264. Robert C. Post, Foreword, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 102 (2003).

265. *Id.* at 97.

266. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1955 (2004) (emphasis omitted).

267. Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL’Y REV. 23, 24 (2005).

268. Jeb Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739 (1989).

269. *Id.* at 740.

270. *Id.* at 800.

body, inform values, and in sum substantially shape the totality of a person's daily life and consciousness."<sup>271</sup> Accordingly, "[l]aws that force such undertakings on individuals may properly be called 'totalitarian,' and the right to privacy exists to protect against them."<sup>272</sup> Laws that deprive individuals of such undertakings once they have been legally entered into and begun to shape the individual's emotional relations, body, values, daily life, and consciousness, are no less totalitarian. Indeed, they may be more so. To borrow a line from Richard Posner (who was writing about the contraceptive law invalidated in *Griswold*), "A constitution that did not invalidate [laws] so offensive, oppressive, probably undemocratic, and sectarian . . . would stand revealed as containing major gaps."<sup>273</sup>

In summary, the Constitution "protect[s] the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households."<sup>274</sup> Even conceding that a state has an important interest in defining the criteria for entry into marriage, under the intermediate form of scrutiny I have suggested, a law that purports to void or deny recognition to an existing relationship "sweep[s] unnecessarily broadly" as a means to advance that interest because it "invade[s] the area of protected freedoms."<sup>275</sup> Once a marriage has been created—that is, once a *family* has been created—privacy means that the range of legitimate purposes the state may invoke for regulating within this sphere narrows dramatically. Nonrecognition laws are constitutionally offensive because they "slic[e] deeply into the family itself"<sup>276</sup> in order to make little more than a symbolic point about the state's preference for heterosexual marriage. Traditional state control over the criteria for marriage does not empower the state to impose its ideas so coercively. As Justice Stevens wrote for the Court, "[A] state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all."<sup>277</sup>

### 3. Respect for Settled Legal and Social Practices

Due Process Clause analysis is informed by settled legal and social practices, especially when the issue involves a substantial liberty interest. It thereby "serves a conserving function, furthering stability in the law and protecting societal expectations concerning individual freedom."<sup>278</sup> The

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271. *Id.* at 801–02.

272. *Id.* at 802.

273. POSNER, *supra* note 178, at 328.

274. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).

275. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (internal quotation marks omitted).

276. *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977) (plurality opinion).

277. *Hodgson v. Minnesota*, 497 U.S. 417, 452 (1990).

278. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 95 (2006) (emphasis omitted).

Court has said that “guideposts” for substantive due process analysis should come from “[o]ur Nation’s history, legal traditions, and practices.”<sup>279</sup> At the same time, it acknowledged in *Lawrence* that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,”<sup>280</sup> and that the inquiry should be informed by “emerging recognition”<sup>281</sup> of contemporary social realities and how law interacts with those realities.

A constitutional right of marriage recognition is consistent with our nation’s settled legal and social practices because it simply enacts and enforces the place of celebration rule. That rule has been called the “universal practice of civilized nations,”<sup>282</sup> and every American state subscribes to it in some form. Joel Prentiss Bishop, commenting more than a century ago on marriage in both English and American common law, wrote that “one universal rule whereby to determine whether parties are to be regarded as married or not” was necessary for “the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion, for everything held dear by the race of man in common.”<sup>283</sup> And so, a right of marriage recognition satisfies the “history and tradition” test.

This conclusion is not altered by the fact that there has been, until recently, no social or legal custom of recognizing *same-sex* marriages. Arguing against the right on that basis would make the same mistake that the Court made in *Bowers v. Hardwick*<sup>284</sup> when it framed the question before it as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”<sup>285</sup> As the Court recognized in *Lawrence*, such a crabbed formulation views the right at too low a level of abstraction and “misapprehend[s] the claim of liberty.”<sup>286</sup> In so doing, it stacks the deck against the plaintiff’s claim. Law traditionally has validated marriages not to advance particular ideas or rules about sexuality or gender, but because doing so protects the stability of legal relationships, advances reasonable expectations, prevents the casual evasion of legal responsibilities, and contributes to smooth functioning of the interstate system. These are neutral, utilitarian policies, and they can fairly be said to be “implicit in the concept of ordered liberty.”<sup>287</sup> Favoritism toward heterosexuality is certainly one “tradition” in American marriage law, but that tradition concerns who gets to

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279. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

280. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

281. *Id.*

282. *Cropsey v. Ogden*, 11 N.Y. 228, 236 (1854).

283. BISHOP, *supra* note 84, § 856.

284. 478 U.S. 186 (1986).

285. *Bowers*, 478 U.S. at 190.

286. *Lawrence*, 539 U.S. at 567.

287. *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

enter marriage. Gender and sexual orientation are irrelevant to the purposes of the established rule of interstate marriage recognition.

Of course, the place of celebration rule is subject to the public policy exception. Is it possible to argue that a liberty interest arises out of a historical tradition if the historical tradition ultimately allowed the state to prevail when the state felt strongly enough about the matter? I believe so. Although “history and tradition” and “ordered liberty” tend to be the language of fundamental rights analysis, I am not arguing for an absolute or fundamental right of marriage recognition. Under an intermediate form of scrutiny that requires the state to describe an important interest and explain why an infringement of liberty is necessary to significantly further that interest, a constitutional right of marriage recognition simply calls for a similar application of reasoned judicial judgment as the public policy exception once did. It calls on judges to examine the nature and weight of state interests and then determine whether those interests justify, as Judge Cardozo put it, “refusing to help the plaintiff in getting what belongs to him.”<sup>288</sup>

#### 4. Due Process in Its Most Basic Sense

There appears to be no clear explanation for what happens, as a formal legal matter, when a state purports to void or deny recognition to a marriage simply by operation of law. Koppelman writes that when a same-sex couple migrates to a mini-DOMA state, “their marriage would cease (or, perhaps, become dormant; it is unclear whether it should spring back to life when they, or one of them, moves back to the state in which they were married).”<sup>289</sup> Or perhaps “the marriage just dissolves.”<sup>290</sup> Just dissolves? Springs back to life? For a relation as important as marriage, this seems, objectively, like madness. (And Koppelman apparently agrees, labeling the “uncertainty” such laws create “intolerable.”<sup>291</sup>) A right of marriage recognition is necessary to preserve the meaning of due process per se.

The right to marry is already protected as a matter of substantive due process. In addition, I have explained in the earlier sections of this Part why an independent liberty interest in an extant marriage is supported by reasonable expectations, marital and family privacy, and the settled legal and social practice of marriage recognition. Taking all these considerations together, it is fair to conclude that when a state voids or denies recognition to an extant marriage, it has deprived the parties of “liberty” within the meaning of the Due Process Clause. Further, this deprivation is “without due process of law”<sup>292</sup> because the state obviously is not offering same-sex couples any sort of adjudication before it effectively dissolves their marriages.

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288. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

289. KOPPELMAN, *supra* note 21, at 90.

290. *Id.* at 91.

291. *Id.* at 26.

292. U.S. CONST. amend. XIV, § 1.

Of course, I am not arguing that a state might be allowed to enforce its mini-DOMA against a migratory same-sex couple as long as it holds a hearing. After all, what sort of evidence would it put on? Rather, the point of this discussion is to underscore what an unusual, even radical, idea it is that a state could unilaterally and by operation of law take away the legal status and rights in marriage that another state has seen fit to create.

The notion that proper procedure is necessary to protect substantive rights is established in the Supreme Court's family privacy jurisprudence, most notably in the protection it provides against interference with the parent-child relationship. In *Santosky v. Kramer*,<sup>293</sup> the Court first took notice of "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child," which afforded the parents "a vital interest in preventing the irretrievable destruction of their family life."<sup>294</sup> The Court then held that, before a state may terminate parental rights based on a parent's alleged unfitness, "it must provide the parents with fundamentally fair procedures,"<sup>295</sup> specifically a hearing at which the state must meet the standard of clear and convincing evidence.<sup>296</sup>

Assuming we are not trapped in the thinking of the state interests paradigm, it is difficult to understand how marriage could require anything less. Indeed, the Court in a famous old case expressly drew the analogy between the marital relationship and the parent-child relationship, calling marriage "a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself . . . ."<sup>297</sup> And as one state high court put it in underscoring that marriage is a legal status and not merely a contract, "When [a marriage is] formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."<sup>298</sup>

The understanding of marriage set forth in modern authorities also defies the idea that a state could effectively nullify the relationship by operation of law. According to a leading treatise, the "distinctive characteristic of permanence distinguishes the marriage status from a purely consensual transaction," and accordingly, a "marriage is subject to dissolution *only through legal proceedings* or the death of one of the spouses."<sup>299</sup> And the Supreme Court has said recently that "we know of no instance" where individuals may "liberate themselves from the constraints of legal obligations that go with marriage . . . without invoking the State's judicial machinery."<sup>300</sup> Further, in *Sosna v. Iowa*,<sup>301</sup> the Supreme Court emphasized

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293. 455 U.S. 745 (1982).

294. *Santosky*, 455 U.S. at 753.

295. *Id.* at 753-54.

296. *Id.* at 769.

297. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

298. *Ditson v. Ditson*, 4 R.I. 87, 101 (1856).

299. COLES ET AL., *supra* note 11, at 558 (emphasis added).

300. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

301. 419 U.S. 393 (1975).



the role of procedural safeguards in a proceeding that would “affect [a couple’s] marital status and very likely their property rights,” along with custody and support for minor children.<sup>302</sup> In other contexts as well, the Court has said that “alteration of legal status,” combined with some resulting injury, “justifie[s] the invocation of procedural safeguards.”<sup>303</sup>

Traditionally, when a marriage had some irregularity in its creation, the law considered it either “void” or “voidable.” “Technically a void marriage is non-existent and has never existed,” while a “voidable marriage . . . is effective until it is formally voided, usually as a result of a court order in an annulment action.”<sup>304</sup> Neither of these concepts can adequately explain the operation or effect of nonrecognition laws.

A migratory marriage cannot properly be categorized as “voidable,” because the mini-DOMA state is not offering an adjudication or any other “process” before declaring it null. And it is extremely problematic from a federalism perspective—as well as simply illogical—to characterize a migratory marriage as “void” *ab initio*. Obviously, the marriage was not void at the start—it was perfectly effective in the marital domicile. If we ignore that fact and indulge a legal fiction that the marriage is void *ab initio* in the eyes of the mini-DOMA state to which the parties have resettled, we effectively allow the mini-DOMA state to give its regulatory laws extraterritorial effect—something that has long been thought to violate both constitutional due process and basic notions of federalism.<sup>305</sup> As Thomas Cooley wrote in 1868, “The legislative authority of every State must spend its force within the territorial limits of the State. The legislature of one State cannot make laws by which people outside the State must govern their actions.”<sup>306</sup> If a state considers a migratory marriage void *ab initio*, it is necessarily saying that it had some legitimate interest and power over the marriage at the time the marriage occurred. But obviously that cannot be true. If Helen and Jenny live and marry in Iowa, Indiana has no proper authority over their lives and relationship unless and until they come within Indiana’s borders and thereby consent to be governed by Indiana’s laws.<sup>307</sup>

At that point, we can acknowledge that Indiana may have a different view on the question of whether their marriage should continue to be given legal effect. But we should not allow the state to simply impose the answer

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302. *Sosna*, 419 U.S. at 406–07.

303. *Paul v. Davis*, 424 U.S. 693, 708–09 (1976).

304. HARRY D. KRAUSE ET AL., *FAMILY LAW* 86 (6th ed. 2007) (emphasis omitted).

305. *See, e.g.*, Stern, *supra* note 160, at 1526 (“The Due Process Clause was used as the source of the principle that a state law could not be applied to property or occurrences beyond the borders of the state.”).

306. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 127–28 (1868).

307. *See, e.g.*, Stern, *supra* note 160, at 1553 (“When a state attempt[s] to regulate matters beyond its borders, it impose[s] a non-reciprocal burden on the individual being regulated. The fact that there [is] no reciprocity in the relationship between the individual and the state indicate[s] a defect of assent to be governed.”).

through a mini-DOMA that declares it “void.”<sup>308</sup> Rather, as I explain in the next Section, we should weigh Indiana’s state interests against the couple’s liberty interest in the ongoing vitality of their marriage.

### C. Assessing Countervailing State Interests

The due process principles discussed above support the argument that a migratory same-sex couple has a significant liberty interest in the ongoing existence of their marriage. I now consider the countervailing interests a state might assert to resist a due process right of marriage recognition.

#### 1. Traditional State Sovereignty over Family Law

Despite the legal and social evolution of marriage I described in Part I, courts still often say that in the American scheme of federalism, matters of domestic relations are reserved to the states.<sup>309</sup> And so one interest that a state might assert to justify a nonrecognition law is its traditional sovereignty over the definition of marriage. But in light of the protection that the Supreme Court’s due process jurisprudence has given to marriage and family relationships as matters of liberty and privacy, as well as the very different consequences of creating versus recognizing a marriage, this interest is perhaps the weakest that a state could maintain.

The maxim that domestic relations are reserved to the states has always been something of an oversimplification. A closer historical examination shows that the paradigm of exclusive state sovereignty “is not an organic, transhistorical principle of American federalism. Rather, it developed as a theory of convenience, strategically invoked and easily dismissed or ignored.”<sup>310</sup> And even if that were not the case, the Supreme Court’s “willingness during the past century to strike down aspects of state laws concerning marriage, divorce, legitimacy, parental rights, and reproductive conduct on a variety of constitutional grounds also contradicts the assertion that family law questions belong to the states” exclusively.<sup>311</sup>

Because a state has the exclusive power to create marriages, it does not logically follow that its sovereign interests also extend to nullifying valid marriages without cause or due process, or that its decision to do so should receive the same degree of deference. In *Williams v. North Carolina*, Justice Douglas famously declared that “[e]ach state as a sovereign has a rightful

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308. See IND. CODE ANN. § 31-11-1-1 (West 2008) (declaring same-sex marriages “void . . . even if the marriage is lawful in the place where it is solemnized”).

309. See, e.g., *United States v. Morrison*, 529 U.S. 598, 615 (2000) (referring to “family law” as an “area[] of traditional state regulation”).

310. Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1768 (2005); see also Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1298 (1998) (“[E]xclusive localism in family law simply misdescribes American history . . .”).

311. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 274 (2009).

and legitimate concern in the marital status of persons domiciled within its borders.”<sup>312</sup> Some conflicts scholars have pointed to this language as support for the idea that when a mini-DOMA state assumes the authority to void or deny recognition to a same-sex marriage, it is simply exercising its ordinary state power over domestic relations.<sup>313</sup> But that inference is unsound because it takes the key language out of context. This passage of *Williams* is not about the primacy of the state over the individual—such an idea would be curious indeed, coming from the pen of William O. Douglas, perhaps the most determined free spirit and proponent of individual autonomy who ever sat on the Court. *Williams* upheld an individual’s ability to control his own marital status by obtaining a divorce.<sup>314</sup> The passage in *Williams* about states’ interest in marital status was rendered in the course of reasoning toward a decision that expanded individual liberty—an individual’s freedom to control his own life—and rejected arguments that the individual’s interests should be subjugated to the state’s morality-based ideas about marriage.<sup>315</sup> And recall that *Williams* overturned *Haddock v. Haddock*,<sup>316</sup> which involved a man who had been validly divorced in one state but was still legally married in another—the same situation that same-sex couples face today.<sup>317</sup> “Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance,” the Court explained in a follow-on decision to *Williams*.<sup>318</sup> “Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.”<sup>319</sup>

As a matter of constitutional doctrine, *Williams* rested on the Full Faith and Credit Clause, not the Due Process Clause.<sup>320</sup> But doctrinal differences aside, the Court was wrestling with much the same problem that marriage nonrecognition laws pose today: the problem that excessive domestic relations localism can impose on individuals and the needs of the interstate system. As Ann Estin writes,

The divorce cases illustrate the key problem with federalism in family law: in a world in which people move frequently from place to place, there is no dependable means of allocating responsibility for families and family disputes among different states. Despite considerable creativity brought to the divorce problem over more than a century by judges, lawyers, treatise writers, and other academic experts, it had become increasingly apparent by 1942 that the old federalism, which gave states broad control over the

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312. *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).

313. *E.g.*, Koppelman, *supra* note 70, at 940.

314. *See Williams*, 317 U.S. at 303.

315. *Id.*

316. *Williams*, 317 U.S. at 304.

317. *Haddock v. Haddock*, 201 U.S. 562, 564–65 (1906).

318. *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 230 (1945).

319. *Id.*

320. *See Williams*, 317 U.S. at 293–94.

norms of family law, did not work. The conflict among the states over divorce was understood as a political problem, but political solutions were not forthcoming, and the Supreme Court was eventually unwilling to allow the policies of a few states to block a more workable national compromise.<sup>321</sup>

In providing that compromise,

the Supreme Court acted on the view that the Constitution demanded a more coherent and unified national approach to the divorce problem than what Congress or the states had been able to achieve. The Court recognized that its rulings would limit the conservative states in enforcement of their divorce laws but concluded that important personal rights were at stake, and that, on balance, the individual interest in marital freedom and the national interest in uniform rules were more important than state divorce policies.<sup>322</sup>

In terms of its imposition on sovereignty, asking a state to *recognize* an extant marriage is a much different matter than requiring it to *create* a marriage to which it objects. As support for this principle, we need look no further than the place of celebration rule, under which states have long agreed to give effect to marriages they would not have created in the first instance.<sup>323</sup> In doing so, states set aside some quantum of their own interests and sovereignty out of recognition that everyone—individuals, sister states, the interstate system—is better off when intact marriages are not disrupted.

In short, if creating a marriage is a core incident of state sovereignty because of “the distinctive role that states play in the formulation and enforcement of community norms and values,”<sup>324</sup> requiring one state to recognize another state’s marriage is simply the price of living in a federal system of equal sovereigns, which “demands that the moral commitments of each state be tempered by a regard for the commitments of its neighbors.”<sup>325</sup>

## 2. Expressive and Channeling Interests

Law has important expressive functions, and despite the loosening of restrictions on marriage entry and the relatively laissez-faire posture of contemporary marriage law and regulation, it is still plausible to say that a state’s marriage policy expresses the values of its governing majority about what kinds of human relationships should be entitled to dignity and protection. Marriage law channels people into a legal relationship with well-established social meaning. When a state excludes gays and lesbians from the possibility of marriage, it expresses its preference for heterosexuality and

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321. Estin, *supra* note 43, at 431 (footnote omitted).

322. *Id.*

323. See *supra* notes 165–166 and accompanying text.

324. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1795 (1995).

325. Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 519 (1992).

enacts the view that heterosexuals are more deserving of marriage's benefits and more capable of fulfilling marriage's social role. This perhaps explains why "[t]he most contentious argument regarding recognizing same-sex marriages is that recognition places a seal of approval on homosexual relationships."<sup>326</sup>

Abundant arguments have been advanced in recent state and federal litigation over whether, under the Constitution, such expressive and channeling interests—which are sometimes shorthanded merely as appeals to “tradition”<sup>327</sup>—can justify withholding marriage *creation* from same-sex couples. But a marriage *recognition* right is agnostic on that question. A state would remain free to express its preference for heterosexuality by licensing only heterosexual marriages. The proper question is, where a valid same-sex marriage already exists as a *fait accompli*, are the state's expressive and channeling interests important enough and necessary to justify nullifying that marriage? The answer should be no.

As a practical matter, a state's signaling about the benefits of heterosexual marriage, whether or not it is effective on single people, is beside the point for gay or lesbian individuals who have already gotten married. Quite simply, the state has missed its opportunity to channel them into a different sort of marriage. Moreover, there is no reason to think that denying legal recognition to existing same-sex marriages will somehow increase the number of people choosing to enter opposite-sex marriages. “Even if one accepts . . . that the state has a reasonable role to play in shaping norms through its domestic laws . . . [a] state that objects to same-sex marriages might signal its views with sufficient clarity through its rules for in-state marriages.”<sup>328</sup>

When a state expresses its favoritism toward heterosexual marriage by denying licenses to same-sex couples, gays and lesbians are excluded from the dignity and benefits of that status—the “positive” component of the right to marry that I discussed in Section III.A<sup>329</sup>—but no one's life is actually made worse than it was before. By contrast, as I explained in Section III.B, voiding or denying recognition to an existing marriage is an extraordinary harm and intrusion, and the magnitude of that harm cannot be justified by mere expressive or signaling interests. If a state believes that same-sex marriages are somehow harmful or unhealthy, it should be required to provide persuasive, objective evidence before interfering with an established legal relationship. In *Romer v. Evans*,<sup>330</sup> the Court said that a state cannot subject gays and lesbians to “special disabilit[ies]” that are “so discontinuous with

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326. Buckley & Ribstein, *supra* note 98, at 591.

327. See Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 341 (2011) (arguing that courts should “be skeptical of a law justified by tradition, and should not uphold it absent a convincing showing of alternative, legitimate purposes”).

328. Buckley & Ribstein, *supra* note 98, at 591.

329. See *supra* notes 167–171 and accompanying text.

330. 517 U.S. 620 (1996).

the reasons offered” that they are “inexplicable by anything but animus.”<sup>331</sup> And *Lawrence* requires states to respect the privacy and autonomy in gay and lesbian relationships. As Tobias Wolff explains, the combined force of these two decisions means that “states may not exclude gay relationships from their territory, may not attempt to dissuade those couples from migrating to the state, and may not subject them to disfavored treatment solely on the basis of moral disapproval.”<sup>332</sup> Thus, “the range of interests that a state can offer in applying forum law to a bona fide out-of-state marriage is significantly constrained.”<sup>333</sup>

### 3. State Control Over Marital Incidents

I argued in Section III.A that a right of marriage recognition is a form of negative liberty, something appropriately protected by the Due Process Clause, because it prevents a mini-DOMA state from coercively interfering with an extant legal family relationship. However, it might be pointed out that if a marriage is recognized, the couple becomes entitled to claim a variety of state-provided benefits and protections—what are typically referred to as incidents of marriage. And so, a mini-DOMA state could argue that a constitutional right of recognition not only would impose symbolic costs on its sovereignty, but it would also impose real costs by forcing the state to confer benefits and protections on marriages that the state has decided do not deserve such incidents. But marital incidents today are, by and large, not an endorsement of any one form or idea of marriage. Accordingly, a state does not have a sufficiently important interest in withholding them from migratory same-sex couples. Moreover, any interest the state does have could not justify the harm that is caused by revoking incidents that marital parties have already enjoyed in another state.

To be clear, the constitutional marriage recognition rule I propose would protect the *status* of marriage. It would not create an entitlement to any *specific* rights or incidents. It would simply require that the couple be recognized as entitled on equal terms to whatever incidents and legal protections are given to all other marriages in a particular state.

Under traditional conflicts doctrine, while the place of celebration rule governed the validity of the marriage, courts were allowed to look to local law to determine whether a married party should be entitled under local law to enjoy a particular marital incident.<sup>334</sup> Until fairly recently, the most important marital incident was the right to legally cohabit. This incident is essentially obsolete today, but it carried real significance when sex outside of marriage could involve criminal penalties. Letting local law control made

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331. *Romer*, 517 U.S. at 631–32.

332. Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2244 (2005).

333. *Id.*

334. C.W. Taintor, II, *What Law Governs the Ceremony, Incidents and Status of Marriage*, 19 B.U. L. REV. 353, 357 (1939).

sense where an incident was intertwined with the forum's criminal law. States generally denied the incident of cohabitation in two situations: where the marriage was "miscegenous," or where it was "within prohibited degrees of consanguinity."<sup>335</sup> However, even where cohabitation was prohibited, states were sometimes willing to recognize a marriage for purposes of property interests, such as a spouse's right to inherit upon the other's death. "Even if cohabitation of two persons . . . would be abhorrent," one authority put it, "the existence of a right to property in one of those two persons after the death of the other . . . seems unobjectionable."<sup>336</sup>

Today, the incidents of marriage fall broadly into three categories. The first is "laws [that] recognize affective or emotional bonds."<sup>337</sup> These include laws which allow one spouse to make medical decisions for the other and which designate a spouse as an automatic heir.<sup>338</sup> The second category of incidents relates to "marriage as . . . an environment . . . for the raising of children."<sup>339</sup> This includes "the presumptions of legitimacy and parentage of children born to a married couple."<sup>340</sup> The third category relates to "the economic arrangements that are likely to exist (or that ought to exist) between partners."<sup>341</sup> These include "[t]ax laws and laws pertaining to government benefits [that] commonly treat married persons in a distinctive manner by regarding them for most purposes as a single economic unit,"<sup>342</sup> as well as rules about marital assets and property, including property division at divorce.<sup>343</sup>

All these incidents favor marriage, but they do not inherently favor or promote *heterosexual* marriage. Thus, a state's heteronormative marriage policy, if it chooses to maintain one, is not significantly undermined by providing these incidents to validly married same-sex couples. Many of the incidents are "facilitative, in the sense that they enable a couple to live a life that they define as satisfactory to themselves."<sup>344</sup> Others are simply practical, recognizing that "married persons differ from most single persons" in that many married couples pool their financial resources and that living together provides economies of scale.<sup>345</sup> Others, like the spousal evidentiary privilege, protect the privacy of the marital relationship. Taken as a whole, state-provided marital incidents are calibrated toward assuring that a marriage endures and can fulfill its social role; toward, as one state

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335. *Id.*

336. *Id.* at 362.

337. David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 453 (1996).

338. *Id.* at 454–56.

339. *Id.* at 453.

340. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003).

341. Chambers, *supra* note 337, at 453.

342. *Id.* at 472.

343. *Id.* at 476–78.

344. *Id.* at 485.

345. *Id.* at 471.

high court has put it, “promoting a commitment between married couples to promote the security of their children and the community as a whole.”<sup>346</sup>

When state supreme courts have struck down anti-same-sex marriage laws, they have rejected the arguments that same-sex couples have less need for state-conferred benefits and protections than opposite-sex couples and that limiting incidents to heterosexuals advances a legitimate state interest in conserving scarce resources.<sup>347</sup> “The legal benefits and protections flowing from a marriage license are of such significance,” said the Vermont Supreme Court, “that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned.”<sup>348</sup>

Whether or not that standard is met by the justifications states have advanced for refusing to create same-sex marriages is a question on which courts have differed, and it is not my concern here. But because marital incidents do not inherently favor or promote any particular type of marriage, a state’s interest in withholding them from same-sex couples is not necessary or important enough to justify the hardship and disruption inflicted when migratory couples are cut off from incidents that they have previously received. Merely making a statement that such couples are morally unworthy of standard marital incidents cannot be an important state interest in itself. And in light of the fact that we do not have marriage visas in this country—marital incidents are made freely and automatically available to virtually all other migratory couples—a policy of withholding incidents from established same-sex couples is not necessary to protecting a state’s policy on what marriages to create. Thus, such a “broad and undifferentiated disability” would be “so discontinuous with the reasons offered for it” that it would be “inexplicable by anything but animus.”<sup>349</sup>

#### 4. Encouraging Heterosexual Procreation

Several state courts that have rejected same-sex couples’ right to marry have done so by crediting the argument that a state has a legitimate interest in preferring heterosexual marriage for reasons of procreation. As the

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346. *Baker v. State*, 744 A.2d 864, 884 (Vt. 1999).

347. *E.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003); *see also Chambers, supra* note 337, at 447. It is also worth noting that, to the extent that provision of some marital incidents requires expenditures from the state treasury, studies have shown that those additional costs can be mitigated, if not completely or more than offset, by a number of fiscal benefits that states experience when they recognize same-sex marriages. *See, e.g.*, ANGELIKI KASTANIS, M.V. LEE BADGETT, & JODY L. HERMAN, THE WILLIAMS INST., THE ECONOMIC IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES IN WASHINGTON STATE (Jan. 2012), *available at* <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/estimating-the-economic-boost-of-marriage-equality-in-washington-state-sales-tax-2> (estimating that “spending on wedding arrangements and tourism by resident same-sex couples and their guests” would add \$88 million to the state and local economies of Washington over the first three years, including \$8 million in tax revenues).

348. *Baker*, 744 A.2d at 884.

349. *Romer v. Evans*, 517 U.S. 620, 632 (1996).



Washington Supreme Court said in *Andersen v. King County*, “[M]arriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple.”<sup>350</sup> Thus, the court said, lawmakers were entitled to believe that limiting marriage to heterosexuals “will encourage procreation.”<sup>351</sup> Similarly, the New York Court of Appeals characterized “marriage and its attendant benefits” as “an inducement” for heterosexuals to “make a solemn, long-term commitment to each other,” something that was justified by the facts that “such relationships are all too often casual or temporary” and that “an important function of marriage is to create more stability and permanence in the relationships that cause children to be born.”<sup>352</sup>

Not all courts have accepted this argument. The Iowa Supreme Court in *Varnum v. Brien* rejected the idea that procreation is “the sine qua non of marriage. Instead, it found that marriage is intended to promote the comfort and happiness of committed couples and to bring order and stability to their relational rights and responsibilities as well as their families.”<sup>353</sup> And more generally, “[t]he elimination of legal distinctions between marital and nonmarital children, the availability of contraceptives, and access to abortion all illustrate both the separation of procreation from marriage and the limited nature of the state’s interest in those decisions.”<sup>354</sup> If such a link ever existed, it was decisively severed by the Court’s holdings in *Griswold*<sup>355</sup> (upholding married persons’ right of access to contraceptives), *Roe*<sup>356</sup> (finding a right to abortion), and *Turner*<sup>357</sup> (striking down a law prohibiting prison inmates from marrying while acknowledging that some such marriages might never be “fully consummated”).

Even if we accept promotion of heterosexual procreation as an important reason for a state to refuse to create same-sex marriages, refusing to recognize extant migratory same-sex marriages is not necessary to effectuate that policy. For a same-sex couple whose marriage already exists, no amount of “encouragement” or “inducement” toward the benefits of heterosexual marriage will change the existential fact of *their* marriage. Allowing a same-sex couple who married in State A to continue living as a married couple in State B would not diminish the power or effectiveness of State B’s marriage-for-procreation policy, any more than the policy is diminished by the empirical fact that many unmarried heterosexuals will continue to cohabit

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350. 138 P.3d 963, 982–83 (Wash. 2006).

351. *Anderson*, 138 P.3d at 983.

352. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

353. Jean C. Love, *The Synergistic Evolution of Liberty and Equality in the Marriage Cases Brought by Same-Sex Couples in State Courts*, 13 J. GENDER RACE & JUST. 275, 318 (2010) (discussing *Varnum v. Brien*, 763 N.W.2d (Iowa 2009)).

354. Hamilton, *supra* note 62, at 350 (footnotes omitted).

355. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

356. *Roe v. Wade*, 410 U.S. 113 (1973).

357. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

and produce children. As with expressive and signaling interests, it may be fine for a state to incentivize heterosexual procreation by celebrating the virtues of heterosexual marriage. But states have long been out of the business of punishing non-marital procreation through harsh regimes that disadvantaged “illegitimate” offspring or threatened to remove children from unwed single parents. Just as it would be unthinkable today for a state to enforce its preference for marital families by *punishing* out-of-wedlock heterosexual procreation, so a state may not punish same-sex couples through the extraordinary harm of voiding or denying recognition to their marriages.

### 5. Fairness to Long-Term Residents

Finally, a state could argue that it would be unfair for migratory same-sex couples to enjoy the status and incidents of marriage when those things are denied to its own existing gay and lesbian domiciliaries. Passing over the fact that a state could remedy this problem by allowing its own same-sex domiciliary couples to marry, there is no real unfairness here, and such objections are not an important reason for voiding or denying recognition to marriages when they migrate from other states.

First, as I explained in Section III.A, recognizing an existing marriage is conceptually and legally distinguishable from creating a marriage. Nullifying a migratory marriage is not necessary to effectuate the values embedded in a state’s marriage-creation policy. This is the principle behind the place of celebration rule, under which states have long recognized marriages that they themselves would not have created. The unfairness here is no greater than was the unfairness to couples who sought common-law marriages, marriages within prohibited degrees of consanguinity, or other unions that their domiciliary states disallowed even while recognizing such unions created in other jurisdictions.<sup>358</sup> Indeed, pursuant to the place of celebration rule, at least one state (Maryland) will recognize same-sex marriages even though it will not create them.<sup>359</sup> New York took the same posture before it began licensing such marriages in 2011.<sup>360</sup>

Second, if we accept the argument that marriage recognition is a significant liberty interest under the Due Process Clause for all married persons, then a state that gives recognition to heterosexual marriages but denies it to same-sex marriages ends up with an equal protection problem. Such a state would have living within its borders two groups of similarly situated citizens whom the law classifies differently: heterosexuals with valid marriages (many having migrated from other states), whom the state favors, and homosexuals with valid marriages, whom the state disfavors.

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358. See *supra* notes 165–166 and accompanying text.

359. See *Marriage Equality & Other Relationship Recognition Laws*, *supra* note 117.

360. NAT’L CONF. OF STATE LEGISLATURES, *supra* note 1.

To sum up, a right of marriage recognition would account for significant due process interests—reasonable expectations, marital and family privacy, settled social and legal practices, and the requirement of proper procedure before liberty is infringed—which a state invades when it voids or denies recognition to a migratory marriage. Under the intermediate level of scrutiny that is appropriate for a right of marriage recognition, a state's interests in depriving same-sex couples of their marriages fail because they are not important enough to justify marriage nullification or because the radical step of marriage nullification is not necessary to significantly advance those interests.

#### V. MARRIAGE RECOGNITION AND FEDERALISM

Most of the arguments I have advanced for a Due Process Clause right of marriage recognition have focused on the interests of married individuals as weighed against the interests of a state in applying its marriage policy coercively to disrupt an extant marriage. I have explained why the state's interests do not justify voiding or denying recognition to a migratory same-sex marriage. I conclude with some observations about the effect a marriage recognition right would have on federalism.

A right of marriage recognition would strike a balance that is acceptable, even necessary, for purposes of federalism. It would allow each state to decide whether to provide same-sex marriage for its own domiciliaries. But it would also underscore that in a highly mobile society like the United States, recognizing a sister state's valid marriage is one of the prices of membership in a federal system of equal state sovereigns. After all, "[o]ne of the virtues of a territorial federalism is precisely that it allows conflicting communities of commitment to coexist within a single national polity, while allowing individuals to move fluidly among them."<sup>361</sup> Such a nuanced conception of federalism—one that attempts to "assess[] . . . the specific weight of state interests" and to "balance state and national interests in a theoretically coherent fashion"<sup>362</sup>—is necessary if states are to "advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise."<sup>363</sup>

Federalism "presupposes that each state will be permitted to effectuate, to the extent consistent with the identical right of every other state, the policies it adopts."<sup>364</sup> But "[t]hose policies are as susceptible to frustration by sister states as by the central government."<sup>365</sup> The current regime of nonrecognition laws in a lopsided majority of states has given us what former

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361. Seth F. Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161, 163 (1996).

362. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 364–65 (1997).

363. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

364. Baxter, *supra* note 143, at 24.

365. *Id.*

Georgia congressman Bob Barr, an advocate-turned-opponent of the federal DOMA, has aptly called “one-way federalism,” because “[i]t protects only those states that don’t want to accept a same-sex marriage granted by another state.”<sup>366</sup> Mini-DOMA states get to bar same-sex marriage for their own domiciliaries, *and* they get to void or deny recognition to migratory marriages created by sister states. As a result, “the novel experiment that is being undertaken on the state level” in the United States right now “is not simply about what quantum of rights to extend to same-sex couples. It is principally about what quantum of disabilities to impose on same-sex relationships.”<sup>367</sup>

Competitive federalism does not work if the playing field is not level. Interstate transportability is a basic incident and defining characteristic of American marriage. When a mini-DOMA state treats a sister state’s marriage license like a piece of worthless foreign currency, it not only violates the rights of the married individuals, it also deems the policy of the other state to be repugnant. As Andrew Koppelman argues, such laws “have no place in a federal system.”<sup>368</sup> “[N]o law, not even one favored by a great majority of the States, [should be allowed to] reduce any State’s official acts, on any subject, to second-class status . . . .”<sup>369</sup> Federalism cannot tolerate a “state’s prideful unwillingness to recognize other states’ laws or judgments on the ground that these are inferior or unacceptable.”<sup>370</sup> Consistent with long-established conflicts principles, a state can adequately protect its interest by refusing to recognize evasive marriages procured by its own domiciliaries—the right of marriage recognition I propose would not alter that rule. But if Indiana gets to decide what marriages it wants to license, a workable federalism also means that Indiana cannot undermine Iowa’s public policy by voiding or refusing to recognize the marriages that Iowa created for its own domiciliaries.

State differences over same-sex marriages reflect what Naomi Cahn and June Carbone call a “blue family paradigm” and a “red family paradigm.”<sup>371</sup> The blue family paradigm emphasizes values of autonomy, equality, and sexual freedom, and consequently is supportive of same-sex marriage.<sup>372</sup> By contrast, the red family paradigm, driven by religious teaching, “counsels

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366. Bob Barr, Opinion, *No Defending the Defense of Marriage Act*, L.A. TIMES, Jan. 5, 2009, available at [http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009-jan05\\_0,1855836.story](http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009-jan05_0,1855836.story).

367. Knauer, *supra* note 190, at 430.

368. Koppelman, *supra* note 70, at 964.

369. Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States’ Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571, 582 (1997) (quoting 142 CONG. REC. S5931, S5932 (daily ed. June 6, 1996) (letter from Lawrence Tribe to Senator Kennedy)).

370. Kramer, *supra* note 123, at 1986.

371. See NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES (2010).

372. See *id.* at 1–2.

more prescriptive (and traditional) roles for men and women” and “celebrate[s] the unity of sex, marriage, and procreation.”<sup>373</sup>

Cahn and Carbone advocate state-by-state experimentation with marriage in the great tradition of federalism.<sup>374</sup> They see nothing wrong with states promoting the importance of marriage generally, or even the superiority of heterosexual marriage specifically. But they also argue that states’ ability to prefer particular family values must be balanced by “respect for autonomy and restraint in the use of the coercive power of the state.”<sup>375</sup> Such a balance acknowledges that “[w]hile the state can articulate the shared values it wishes to promote, it is a very different matter—constitutionally and normatively—to impose such values on residents who may not share them.”<sup>376</sup> A right of marriage recognition honors this balance, because its central premise is that “[t]he state interest in promoting stability and commitment is . . . distinct from its ability to intrude into realms of private expression and meaning.”<sup>377</sup>

A workable federalism requires some principled description of the proper scope, limits, and interrelationship of each state’s sovereign authority. It is well established in constitutional doctrine that “all states exist on an ‘equal footing’ and are ‘equal in power, dignity, and authority.’”<sup>378</sup> Yet the Constitution “offers no guidance about what to do when [states] do not respect each other” or how to “regulate[] the friction between these mini-spheres when they inevitably collide,”<sup>379</sup> and “no clear constitutional restraint on exclusions that indirectly frustrate regulatory objectives in other states.”<sup>380</sup> Allan Erbsen has suggested that “[a] constitutional common law of comity, if applied with a light touch,” could help moderate such friction.<sup>381</sup> As we saw in Part II, states legislating mini-DOMAs have destroyed the comity that conflict of laws doctrine is intended to protect. As a result, when it comes to same-sex marriage, we currently have neither a workable federalism nor a fair and rational approach to dealing with the human relationships that are at risk from nonrecognition laws. The constitutional compromise that is inherent in a right of marriage recognition is the best solution from the standpoint of federalism as well as individual rights.

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373. *Id.* at 2, 168.

374. *Id.* at 208 (“Let Massachusetts permit same-sex unions, Louisiana experiment with covenant marriage, Utah provide for high school courses in marriage preparation, and 1,000 counties prescribe premarital education.”).

375. *Id.* at 163.

376. *Id.*

377. CAHN & CARBONE, *supra* note 371, at 164.

378. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 507 (2008).

379. *Id.* at 509–10.

380. *Id.* at 520.

381. *Id.* at 569.

## CONCLUSION

Courts, lawmakers, and citizens are all engaged in a vigorous national debate over whether the constitutional right to marry must include gays and lesbians. Virtually forgotten in that debate are tens of thousands of couples who already have obtained such marriages, but who face the prospect of losing them if they cross the wrong state border to accept a new job, pursue a degree, or attend to family responsibilities. Conflicts doctrine is of no use in dealing with this problem because it has been overtaken by legal and social realities and has been rendered impotent by the simple fact that most states are ignoring the rule that conflicts doctrine prescribes in this situation.

To deal with existing same-sex marriages rationally and fairly, it is appropriate to turn to the Constitution. The right of marriage recognition I have described would not force any state to create a same-sex marriage, but it would prevent them from inflicting unjustified harms on migratory couples. It would solve a pressing problem of interstate relations and human dignity through a constitutional intervention that is narrow, carefully crafted, and validated by historical experience.